76-694

Supreme Court, U. S.
FILED
NOV 17 1976
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

JAMES L. BUCKLEY, *et al.*,

*Intervenors-Appellants,*

*and*

ISABELLA M. PERNICONE, ESQ.,
as Guardian *ad Litem*,

*Intervenor-Appellant,*

*against*

CORA MCRAE, *et al.*,

*Plaintiffs-Appellees.*

---

JAMES L. BUCKLEY, *et al.*,

*Intervenors-Appellants,*

*and*

ISABELLA M. PERNICONE, ESQ.,
as Guardian *ad Litem*,

*Intervenor-Appellant,*

*against*

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

*Plaintiff-Appellee.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

## JURISDICTIONAL STATEMENT

GERALD E. BODELL,
*Counsel for Intervenors-Appellants,*
SENATORS JAMES L. BUCKLEY
and JESSE A. HELMS,
CONGRESSMAN HENRY J. HYDE,
102 East 35th Street,
New York, New York 10016.
(212) 686-1900

A. LAWRENCE WASHBURN, JR.,
*Counsel for Intervenor-Appellant,*
ISABELLA M. PERNICONE, ESQ.,
117 Pennsylvania Avenue,
Brooklyn, New York 11207.
(212) 498-6300

*Of Counsel:*
BODELL & MAGOVERN, P. C.,
LEONARD F. MANNING,
DENNIS J. HORAN,
PATRICK A. TRUEMAN,
DOLORES V. HORAN,
JOHN D. GORBY,
*Attorneys for*
*Americans United for Life, Inc.*
*Legal Defense Fund,*
230 North Michigan Avenue,
Chicago, Illinois 60601.
(312) 263-5386

TABLE OF CONTENTS


| | Page |
|---|---|
| Opinion Below . . . . . | 4 |
| Jurisdiction . . . . . | 4 |
| Statutes Involved . . . . . | 5 |
| The Questions Presented. . . . | 10 |
| Statement of the Case . . . . . | 5 |
| The Federal Questions are Substantial . . . . . | 11 |


Index to Appendix


| | Page |
|---|---|
| Notice of Appeal . . . . . | 1a |
| Certificate of Service . . . . | 5a |
| By Dooling, J. Memorandum and Order dated Oct. 22, 1976 Granting Preliminary Injunction . . . . | 7a |
| By Dooling, J., Order dated Oct. 25, 1976 Denying Application for Stay Pending Appeal . . . . . | 45a |
| By Dooling,J. Order dated Oct. 29, 1976 Denying Application of Secretary of HEW . . . . | 47a |

Page

By Sirica, J., Opinion and Order dated Oct. 21, 1976, Dismissing Complaint for Lack of Jurisdiction . . 53a

By Buinno, J., Opinion dated Oct. 1, 1976, Denying Temporary Restraining Order . . . . . 74A

Public Law 94-439 . . . . . 103A

Senate-House Conference Report Dated September 15, 1976 . . . . . 124A

President Ford's Veto Message . . . . 128A



TABLE OF AUTHORITIES

CASES

Page

Dandridge v. Williams, 397 U.S. 471, 485(1970) 22

Doe et al. v. Mathews, Civil Action No. 76-1912(opinion of Judge Biunno, dated Oct. 1, 1976) 14

Doe et al. v. Mathews, Civil Action No. 76-1835(opinion of Judge Sirica, dated October 21, 1976) 14

Griswold v. Connecticut, 381 U.S. 479(1965) 18

Jefferson v. Hackney, 406 U.S. 535,546-7(1972) 23

Klein v. Nassau County Medical Center, 409 F. Supp. 731(E.D.N.Y. 1976) 20

Legion v. Richardson, 354 F. Supp. 456(S.D.N.Y., 1973), affd. 414 U.S. 1058 22

Lovett v. United States, 66 F. Supp. 142(1945) 14,18

McLucas v. DeChamplain, 421 U.S. 21(1975) 24

| Cases | Page |
|---|---|
| Meek v. Pittinger, 421 U.S. 349 (1975) | 18 |
| Pierce v. Society of Sisters, 268 U.S. 510(1925) | 18 |
| Schlesinger v. Reservists Committee, 418 U.S. 208(1974) | 20 |
| Singleton v. Wulf, 96 S. Ct. 2868 (1976) | 19 |
| U.S. v. Lovett, 328 U.S. 303(1946) | 14,15, 16,17, 19 |
| Warth v. Seldin, 422 U.S. 490(1975) | 19 |
| Wisconsin v. Yoder, 406 U.S. 205 (1972) | 18 |
| STATUTES | |
| 18 N.Y. Code of Rules and Regulations 500.3 | 20 |
| N.Y. State Department of Social Services Transmittal No. 76 ADM-92 | 20 |
| OTHER AUTHORITIES | |
| Congressional Record | 23,24 |


In the
SUPREME COURT OF THE UNITED STATES

---

JAMES L. BUCKLEY,et al.,
Intervenors-Appellants,

-and-

ISABELLA M. PERNICONE, ESQ.,
as Guardian ad Litem,
Intervenor-Appellant

-against-

CORA McRAE, et al.,
Plaintiffs-Appellees.

---

JAMES L. BUCKLEY et al.,
Intervenors-Appellants,
-and-
ISABELLA M. PERNICONE, ESQ.,
as Guardian ad Litem,
Intervenor-Appellant,

-against-

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,
Plaintiff-Appellee.

---

On Appeal From the United States District Court for the Eastern District of New York

---

## JURISDICTIONAL STATEMENT

---

GERALD E. BODELL
Counsel for Intervenors-
Appellants
Senators James L. Buckley
and Jesse A. Helms
Congressman Henry J. Hyde
102 East 35th Street
New York, New York 10016
(212) 686-1900

A. LAWRENCE WASHBURN,JR.
Counsel for Intervenor-
Appellant
Isabella M. Pernicone, Esq.
117 Pennsylvania Avenue
Brooklyn, New York 11207
(212) 498-6300

Of Counsel:
BODELL & MAGOVERN, P. C.
LEONARD F. MANNING
DENNIS J. HORAN
PATRICK A. TRUEMAN
DOLORES V. HORAN
JOHN D. GORBY
Attorneys for
AMERICANS UNITED FOR LIFE, INC.
LEGAL DEFENSE FUND
230 North Michigan Avenue
Chicago, Illinois 60601
(312) 263-5386



Intervenors-appellants appeal from an order of the United States District Court for the Eastern District of New York (Dooling, J.), entered on October 22, 1976 (a) enjoining the application of §209 of the Congressional appropriation for HEW programs for the fiscal year commencing October 1, 1976, Public Law 94-439 (Sept. 30, 1976), (b) mandating the expenditure of federal matching Medicaid funds for non-medically indicated abortions as before the enactment of §209 of Public Law 94-439 and (c) mandating the immediate communication and dissemination of notice of the court's order to HEW regional offices, State Medicaid authorities and providers. The court enjoined the application of §209 as unconstitutional under the Equal Protection Clause of the Fourteenth Amendment on the ground that said section effects the denial to indigent women of the right to have non-medically indicated abortions because it states, "None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term." The court mandated the expenditure of federal funds as funds appropriated for non-medically indicated abortions on the ground that §209 should not be construed as a refusal to appropriate but as an unconstitutional restriction upon the use of the funds appropriated.

## OPINIONS BELOW

The memorandum and order of United States District Judge John F. Dooling, Jr. (unrecorded), dated October 22, 1976, is reproduced in the Appendix herein (at p. 7a ). There are no separate findings of fact or conclusions of law. The order denying a stay pending appeal is reproduced at p.45a. The memorandum and order dated October 29, 1976, denying a motion to amend the injunction is reproduced at p. 47a.

The Appendix also includes the opinions of Federal District Courts for the Districts of New Jersey and the District of Columbia rendered in connection with challenges to the constitutionality of §209 of Public Law 94-439. The opinion and order of United States District Judge John J. Sirica, dated October 21, 1976, is reproduced at p. 53a. The opinion of United States District Judge Vincent P. Biunno, dated October 1, 1976, is reproduced at p. 74A.

## JURISDICTION

The jurisdiction of this Court to review the instant case is conferred by 28 U.S.C. §1252.

The order appealed from was filed on October 22, 1976. Senators Buckley and Helms and Congressman Hyde, together



with Isabella M. Pernicone, in the same order were permitted to intervene. They filed a Notice of Appeal on October 29, 1976. The Notice of Appeal is reproduced at p. 1a.

## STATUTE INVOLVED

On September 30, 1976, Congress enacted the Departments of Labor and Health, Education and Welfare Appropriations Act for Fiscal Year 1977, Public Law 94-439. The full text of Public Law 94-439 is reproduced in the Appendix herein at p. 103A. §209 of said Act provides:

> "Sec. 209. None of the funds contained in this Act shall be used to perform abortions except when the life of the mother would be endangered if the fetus were carried to term."

## STATEMENT OF THE CASE

Appellees commenced this action seeking declaratory and injunctive relief (28 U.S.C. §§2201, 2202) against enforcement of §209 of the Departments of Labor, and Health, Education and Welfare Appropriations Act for Fiscal Year 1977, Public Law 94-439 (Sept. 30, 1976) insofar as the Act fails to pro-

vide 1/ federal matching Medicaid funds for non-medically indicated abortions.

Asserting federal jurisdiction under 28 U.S.C. §§1331 and 1361, appellees alleged that §209 of the Act deprived pregnant women eligible under the New York State Medicaid Plan of due process and equal protection of the laws in violation of the Fifth Amendment and of their right to privacy and liberty under the Fourth, Fifth and Ninth Amendments to the United States Constitution. Appellees also alleged that §209 deprived physicians of the right to practice medicine in accordance with their best medical judgment as guaranteed by the First, Fourth, Fifth and Ninth Amendments of the United States Constitution and denied Planned Parenthood the right to continue its program of medical services without due process of law. Appellees further

---

1/ Paragraph 22 of the complaint in 76-C-1804 erroneously states that the defendant is "prohibited" from expending federal matching Medicaid funds to pay for non-medically indicated abortions. However, the case was argued and decided on the basis that only the funds appropriated by the Act for the fiscal year 1977 were limited in any way. Funds on hand and funds available under other acts were not affected. See opinion of Dooling, J., at p. 33A ; opinion of Sirica, J., at p. 54A ; opinion of Biunno, J., at p. 90A.



contended that §209 served no secular purpose and therefore constituted an establishment of religion, in violation of the First Amendment.

Appellees in No. 76-C-1804 are Cora McRae, a New York resident and Medicaid recipient with one child, who is separated from her husband and is in the first trimester of pregnancy, and who had decided, in consultation with her physician, to undergo a non-medically indicated abortion in order to return to work after completing a course of secretarial studies; Planned Parenthood, a non-profit New York corporation that provides family planning services and operates State licensed clinics where abortions are performed for Medicaid-eligible women; and Irwin B. Teran, a physician who performs abortions for Medicaid-eligible women. Appellee McRae has sued on her own behalf and on behalf of pregnant women in the State of New York similarly situated. Appellee Teran has sued on his behalf and on behalf of duly licensed physicians and surgeons certified for participation in Medicaid and presently performing or desiring to perform non-medically indicated abortions on members of the class of pregnant women named in the complaint.

Appellee in No. 76-C-1805 is N. Y. City Health and Hospitals Corporation, a public benefit corporation that operates 16 municipal hospitals, 12 of which perform abortions.

On October 1, 1976, an application by appellees for a temporary restraining order was granted by the District Court and thereafter extended to October 22, 1976.

At a hearing held October 19, 1976, Senators James L. Buckley of New York and Jesse A. Helms of North Carolina, and Representative Henry J. Hyde of Illinois, and Isabella M. Pernicone, Esq., separately, a member of the Bar of the State of New York, as guardian ad litem for unborn children as a class affected by the outcome of the suit, moved for and were granted intervention.

On October 22, 1976, the District Court entered a preliminary injunction ordering the Secretary of HEW, his successors in office, agents, servants, employees, attorneys, and those other persons in active concert and participation with him, who receive actual notice of the order, to (A) cease to give effect in any way to §209 of the Public Law 94-439, (B) continue to authorize and expend federal matching Medicaid funds for abortions at the proportionate level and in accordance with the standards under which they were being paid before enactment of §209 of Public Law 94-439, and (C) immediately communicate and disseminate the following notice to his Department's Regional Directors, and all State and local Medicaid authorities and providers:



> "In conformity with the order of the United States District Court for the Eastern District of New York, entered October 22, 1976, which enjoins enforcement of the Hyde Amendment, the Department of Health, Education and Welfare will provide reimbursement for all abortions provided to Medicaid-eligible women by certified Medicaid providers on the same basis as the Department pays reimbursement for pregnancy and childbirth-related services."

As part of its memorandum and order of October 22, 1976, the District Court, certified No. 76-C-1804 as a class action on behalf of the classes of pregnant or potentially pregnant Medicaid-eligible women and duly-licensed and Medicaid-certified physicians and providers of abortion services in the State of New York. The District Court granted intervention as citizen-taxpayers to the members of Congress and to Isabella M. Pernicone, Esq., as guardian ad litem for unborn children as a class affected by the outcome of the suit.

The District Court denied a motion to stay its order pending appeal.

On October 29, 1976, the Court denied the motion of the Secretary of HEW to amend the preliminary injunction to provide that federal matching Medicaid funds paid to the States as a result of its order would be subject to recoupment if the order were to be reversed on appeal.

The Court stated in its memorandum of October 29, 1976 that a holding that Section 209 of Public Law 94-439 was unconstitutional had been implicit in the order granting the preliminary injunction.

On November 3, 1976, the Secretary of HEW issued the notice in accorddance with the order of the District Court.

## QUESTIONS PRESENTED

(1) Whether the United States District Court for the Eastern District of New York exceeded its jurisdiction in entertaining respondent's complaint on its merits and in directing the Secretary of Health, Education and Welfare to expend federal funds for elective abortions.

(2) Whether there is a rational basis for the Congressional classification between medically dictated abortions and elective abortions.



## THE FEDERAL QUESTIONS ARE SUBSTANTIAL

Public Law 94-439 is an appropriations act. It appropriated funds, in the total amount of $53.6 billion dollars, for the Department of Labor and the Department of Health, Education and Welfare for the period October 1, 1976 through September 30, 1977. As part of that overall appropriation, Congress enacted(under the heading, "Social and Rehabilitation Service-Public Assistance"), "For carrying out, except as otherwise provided, titles I, IV, X, XI, XIV, XVI, XIX, and XX of the Social Security Act . . . $18,040,850,000. . ."(underscoring added). It is "otherwise provided." Section 209 states, "None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term". Out of the funds for Title XIX(Federal support for State Medicaid programs), Respondent McRae seeks to have her elective abortion federally financed and the Respondent Teran and the corporate respondents seek federal funding of their elective abortion services. But, Section 209 is a clear declination by Congress to appropriate any funds for elective abortions.

The Appropriations Act(Public Law 94-439) passed both Houses of Congress, but was vetoed by the President. The

President concurred in Congress' refusal to appropriate funds for elective abortions. His sole objection related to the potential inflationary impact of this sizable appropriation. The Presidential veto was overridden by a two-thirds vote in each House of Congress, by a vote of 67 to 15 in the Senate and by a vote of 312 to 93 in the House of Representatives. From the legislative history of the subject Appropriations Act, it is clear that, but for the so-called Hyde Amendment, the Appropriations Act would not have been passed by the Congress in the first instance and it is doubly clear that, but for the Hyde Amendment, the President's veto would not have been overridden.

The Hyde Amendment is a patent declaration by Congress that it was not appropriating funds for elective abortions. Respondents in this case have sought and are seeking to excise that declaration and have sought and are seeking to mandate the disbursement of Federal funds in support of state services for which Congress failed to make an appropriation. Of legal necessity, Respondents' attack is directed at the Appropriations Act as a whole. In essence, they requested the Court below and now request this Court to exercise a second veto.



Congress has made one inescapable fact absolutely clear: it was not appropriating, it refused to appropriate, any federal funds for elective abortions. In brief, there has not been and there is not now any appropriation, for the period October 1, 1976 through September 30, 1977, of funds for elective, non-medically dictated abortions. It is beyond competence of any Court, state or federal, in the United States, to sit in judgment respecting the wisdom of Congress when Congress refuses to make appropriations. The complaint is really a demand that funds be disbursed by the Secretary of the Treasury, himself not a party here, even though there has been no Congressional appropriation. There is no escaping the fact that this Court is really being asked by Respondents to affirm an order directing the Secretary of the Treasury to violate the Constitution's express proscription that "no money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . ." U.S. Const., Art. I, §9, Cl. 7.

Apart from the merits, there are presented two substantial and fundamental questions, the answers to each of which dictate that the Court below lacked jurisdiction to adjudicate respondents' alleged claims: (1) Plaintiffs do not present <u>justiciable</u> claims; and(2) Plaintiffs do not present an Article III <u>controversy</u>.

On both issues the decision of the Court below contradicts decisions of two other United States District Courts, that of the District Court for New Jersey, Doe et al. v. Mathews, Civil Action No. 76-1912 (opinion of Judge Buinno, dated Oct. 1, 1976); and that of the District Court for the District of Columbia, Doe et al. v. Mathews, Civil Action No. 76-1835 (Opinion of Judge Sirica, dated Oct. 21, 1976). (Reproduced pp. 53A, 74A)

Public Law 94-439 provides an appropriation for one fiscal year. The Hyde Amendment is an express declaration that Congress refused to appropriate funds for elective abortions. That express refusal to appropriate is effective for only one fiscal year. It is tied by its term and by its terminology to the appropriation. This is not at all comparable to the statute annulled by the Court in United States v. Lovett, 328 U.S. 303 (1946).

Yet, it is Lovett upon which the Court below placed its exclusive reliance. Not one of the four opinions of the Judges of the Court of Claims, Lovett v. United States, 66 F. Supp. 142 (1945), nor either of the two opinions rendered by this Court (Mr. Justice Black for the Court, Mr. Justice Frankfurter, joined by Mr. Justice Reed, concurring, 328 U.S. at 318) supported the lower Court's conclusion that the Hyde Amendment "is a constraint on the use of appropriated funds, (p. 33A)



In mandating the disbursement of funds for elective abortions the District Court usurped the spending and appropriations power which (subject only to Presidential veto) is vested in Congress and Congress alone. U.S. Const. Art I, §8, Cl. 1. The Court below has taken upon itself and the adjudication of, and has assumed a competency to adjudicate, a political question. It is a palpable violation of the doctrine of separation of powers. This it has done in the name of Lovett.

First, the Supreme Court's decision in Lovett was simply an affirmance of the Court of Claims decision. The Court of Claims did not mandate any appropriation of funds. It held only that Lovett and his fellow respondents were entitled to be paid. That was the extent of the Court's decision and that determination exhausted the power of the Court of Claims. In neither the opinion of Mr. Justice Black nor in the opinion of Mr. Justice Frankfurter nor in any of the opinions of the Judges of the Court of Claims is there to be found any mandate of any executive officer to pay that to which the Court ruled respondents were entitled. Entitlement adjudicated, payment was left to the will of Congress.

Secondly, Mr. Justice Black, for the Court in Lovett concluded that Section 304 was not a limitation on an appropriations measure. Section 304 was a rider or an amendment to the Urgent Deficiency Appropriation Act of 1943. But Section 304 barred the use of any appropriated funds, then appropriated in the 1943 Act or thereafter appropriated in any subsequent act, to compensate the named respondents. It was, Mr. Justice Black concluded, a bill of attainder. It was not a simple refusal to pay or a refusal to appropriate. It was a Congressionally imposed disqualification to hold civil office and it was imposed permanently upon the respondents. The rider terminated respondents' employment and imposed a disability on future federal employment. Not once, but at least seven times, the Court repeated that respondents were barred from office. See, e.g., 328 U.S. at 308, 309, 310, 311, 312, 313, 314. And, the Court concluded,

> We, therefore, cannot conclude. . . that Section 304 is a mere appropriation measure, and that since Congress had complete control over appropriations, a challenge to the measure's constitutionality does not present a justiciable question in the courts . . .



> We hold that the purpose of Section 304 was not merely to cut off respondents' compensation through regular disbursing channels, but permanently to bar them from governmental service. Id at 313(underscoring added).

Section 209 of Public Law 94-439 cannot be equated with Section 304 of the Urgent Deficiency Appropriations Act of 1943. Section 209 is a refusal to appropriate. It is a "cutting off" of "compensation" for elective abortions. It is not, as is a bill of attainder, a regulatory statute. Nor is it a prohibitory statute which interdicts any women's right to have an elective abortion. What respondents sought in Lovett was vindication of their Constitutional right, their Constitutional guarantee of freedom from bills of attainder.

What plaintiffs seek here is something immeasurably more than a vindication of Constitutional rights. They demand Federal funding of the exercise of their asserted Constitutional rights. The Constitution guarantees a respectable panoply of civil and personal rights, but nowhere in the Constitution is there any guarantee of Federal subsidies for the exercise of those rights. If the Federal government is required to subsidize a women's right to have an elective abortion, what of other Constitutional

rights to which others are Constitutionally entitled? Where do we draw the line on these alleged Constitutional subsidies if indeed a line can be drawn? Would, e.g., the educational costs incurred by parents who send their children to private elementary and secondary schools be required to be subsidized by the Federal government? See Pierce v. Society of Sisters, 268 U.S. 510(1925) and Griswold v. Connecticut, 381 U.S. 479(1965) which elevated the parental right in Pierce to First Amendment status. And, must the Amish be Federally subsidized when they provide "home education" for their children? See Wisconsin v. Yoder, 406 U.S. 205(1972). Indeed, must we become inevitably reembroiled in reevaluation of the many decisions denying governmental financial aid to parents who choose to send their children to church-related schools? See, e.g., Meek v. Pittinger, 421 U.S. 439(1975).

Thirdly, by its very nature a bill of attainder cannot possibly be characterized as an appropriations measure or as a measure simply denying an appropriation for specific purposes. An appropriations measure provides funds or denies funds. If that was all Section 304 of the Urgent Deficiency Appropriations Act of 1943 accomplished, there would never have been a United States v. Lovett. The Court in Lovett read Section 304 "as though it expressly discharged respondents from office which



they held and prohibited them from holding any office under the Government in the future." 328 U.S. at 320.

There is no permanence in our Section 209. It is a one year limitation to a one year appropriations measure. It is a refusal to include in appropriations for the present fiscal year any funds for elective abortions. It does not adjudicate. It does not regulate. It does not prohibit any act or activities. It simply refuses to appropriate. In Lovett, Congress substituted its legislative determination of guilt and a legislative imposition of punishment for a judicial finding and a judicial sentence. On its face, Lovett's Section 304 could not be rationally related to the war-time Urgent Deficiency Appropriations Act of 1943. Lovett is sound. It is essentially sound. It is wholly sound. But, it is essentially and wholly distinguishable from our present case.

Even if the issues presented here were "justiciable", respondents lack standing and there is no "controversy" over which the District Court or this Court could or can exercise jurisdiction. U.S. Const. Art. III, §2, Cl. 1. See Singleton v. Wulf, 96 S. Ct. 2868(1976); Warth v. Seldin, 422 U.S. 490(1975). The Hyde Amendment was a determination by Congress not to appropriate funds to the states. It did not and does not deny any

state the authority to provide state-funded Medicaid payments for elective abortions. Klein v. Nassau County Medical Center, 409 F. Supp. 731(E.D.N.Y. 1976). The State of New York unconditionally provides for abortion care irrespective of federal reimbursement. 18 New York Code of Rules and Regulations 500.3. And, New York State provides compensation for all abortions, "both induced and spontaneous." N.Y. State Dept. of Social Services Transmittal No. 76 ADM-92. Indeed, until Klein v. Nassau County Medical Center, supra, 409 F. Supp. 731, is heard and decided by this Court, New York State is obligated to continue payments for elective abortions. Thus, regardless of the Hyde Amendment, all Plaintiffs will be compensated by the State of New York. There is nothing for them to gain personally or financially in this action. As noted, their claim is really a claim against the Treasurer of the United States on behalf of the State of New York. The real controversy is between the State of New York and the United States. Plaintiffs lack both taxpayer standing and "citizen standing" to assert such a claim. See Schlesinger v. Reservists Committee, 418 U.S. 208 (1974).



Were we to assume that respondents present a justiciable controversy, we reach the final issue, the lower court's conclusion that the Hyde Amendment is unconstitutional. The lower court's apparent reasoning was that Section 209 operates to discriminate irrationally and invidiously against the poor. The court below excerpted parts of two sentences from the Conference Report on the bill dealing with Section 209. (See pp. 11a-12a). The entire paragraph from which the court quoted is more illuminating. It reads:

> It is the intent of the Conferees to limit the financing of abortions under the Medicaid program to instances where the performance of an abortion is deemed by a physician to be of medical necessity and to prohibit payment for abortions as a method of family planning, or for emotional or social convenience. It is not our intent to preclude payment for abortions when the life of the woman is clearly endangered, as in the case of multiple sclerosis or renal disease, if the pregnancy were carried to term. Nor is it the intent of the Conferees to prohibit medical procedures necessary for the termination of an ectopic pregnancy or for the treatment of rape or incest victims; nor is it intended to prohibit the use of drugs or devices to prevent implantation of the fertilized ovum.

It is evident that the Congress drew a distinction based on health needs (whether physical or mental) and not on financial needs. A classification between elective surgery and medically dictated surgery is certainly rational. In an act designed to provide health services it is palpably rational and, in an appropriations measure, it is wholly beyond judicial challenge.

This Court recently affirmed a similar classification in the federal Medicaid statute as having a rational basis, upholding the exclusion of federal matching funds for inpatients in mental hospitals between the ages of 21 and 65. Legion v. Richardson, 354 F. Supp. 456 (S.D.N.Y., 1973), affirmed without opinion, sub. nom. Legion v. Weinberger, 414 U.S. 1058 (1973), rehearing denied 415 U.S. 939 (1974).

In recent years, this Court has emphasized repeatedly that in the area of economics and social welfare, a statute does not violate the Equal Protection Clause so long as the legislature's judgments are rational, and not invidious. The efforts of Congress to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket. Dandridge v. Williams, 397 U.S. 471, 485 (1970) rehearing denied 398 U.S. 914 (1970);



Jefferson v. Hackney, 406 U.S. 535, 546-7 (1972), rehearing denied 409 U.S. 898 (1972).

Appellee's claim of denial of equal protection to the poor was debated fully on the floors of both House and Senate, e.g.:

> MR. HYDE: We hear the claim that the poor are denied a right available to other women if we do not use tax money to fund abortions. Well, make me a list of all the things society denies poor women and let them make the choice of what we will give them. Cong. Rec. H. 6646 (daily ed. June 24, 1976)

> MR. HELMS: It has been alleged by a director of the corporation which administers New York City's municipal hospitals that "the level of health care in municipal hospitals is shocking." A major cause of this needless suffering and death of the poor has been the diversion of funds from ordinary health care to the operation of a "responsive" abortion program. Perhaps the morbidity and mortality suffered by the poor as a result of this choice of priorities ought to be included when we analyze the "safety" of induced

abortion as a health-care boon to the poor. Cong. Rec. S. 10800 (daily ed. June 28, 1976). (emph. supp.)

The legislative judgment of Congress to draw a distinction based on health needs is detailed on many pages of the Congressional Record. The classification between elective surgery and medically indicated surgery as applied to appropriation of federal matching Medicaid funds for abortions was arrived at only after arduous debate and extensive negotiation among the Senate-House conferees. The judgment of a majority of the members of the House and Senate as to the constitutionality of Section 209 was thereby expressed, while no intent to "prejudge any constitutional questions" in cases pending before this Court was implied. Conference Report, dated September 15, 1976, at p. 127A.

Since the Secretary of HEW is presently bound by the District Court's injunction based on the Court's view that Section 209 of Public Law 94-439 is unconstitutional, this Court has jurisdiction under 28 U.S.C. 1252. McLucas v. DeChamplain, 421 U.S. 21 (1975).



## CONCLUSION

Accordingly, appellants respectfully urge that the Court note probable jurisdiction and set the case for briefing and argument on the merits.

Respectfully submitted,

GERALD E. BODELL
Counsel for Intervenors-Appellants
Senators James L. Buckley and Jesse A. Helms, Congressman Henry J. Hyde
102 East 35th Street
New York, New York 10016
(212) 686-1900

A. LAWRENCE WASHBURN, JR.
Counsel for Intervenor-Appellant, Isabella M. Pernicone, Esq.
117 Pennsylvania Avenue
Brooklyn, New York 11207
(212) 498-6300

# APPENDIX

## Notice of Appeal

IN THE
SUPREME COURT OF THE UNITED STATES

----------x

CORA McRAE, individually and on behalf of all others similarly situated, PLANNED PARENTHOOD OF NEW YORK CITY, INC.; and IRWIN B. TERAN, M.D., individually and on behalf of all others similary situated,

Plaintiffs,

- against - 76 C 1804

F. DAVID MATHEWS, Secretary, United States Department of Health, Education and Welfare,

Defendant

and

SENATORS JAMES L. BUCKLEY, JESSE A. HELMS, CONGRESSMAN HENRY J. HYDE and ISABELLA M. PERNICONE, As Guardian for the unborn,

Interveners.

----------x

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Plaintiff,

- against -

76 C 1805

F. DAVID MATHEWS, Secretary, United States Department of Health, Education and Welfare,

Defendant,

and

SENATORS JAMES L. BUCKLEY, JESSE A. HELMS, CONGRESSMAN HENRY J. HYDE, and ISABELLA M. PERNICONE, As Guardian for the unborn,

Interveners.

----------x



NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that Senators James L. Buckley, Jesse A. Helms and Congressman Henry J. Hyde, and Isabella M. Pernicone, as Guardian, the interveners herein, hereby appeal to the Supreme Court of the United States from the Order of the United States District Court for the Eastern District of New York (Dooling, J.) entered in this action on October 22, 1976.

This appeal is taken pursuant to 28 USC § 1252.

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

A. Pleadings by plaintiffs

B. Pleadings by defendants

C. Opinion and Order of the Court, dated October 22, 1976.

III. The following questions are presented by this appeal:

Whether the United States District Court for the Eastern District of New York exceeded its authority and jurisdiction in directing the Secretary of Health, Education and Welfare to expend Federal funds for elective abortions.

BODELL & MAGOVERN, P. C.
Attorneys for Appellants-
Interveners
Senators James L. Buckley,
Jesse A. Helms and
Congressman Henry J.
Hyde
102 East 35th Street
New York, New York 10016
(212) 686-1900



A. LAWRENCE WASHBURN, JR.
Attorney for Appellant-
Intervener
Isabella M. Pernicone
117 Pennsylvania Avenue
Brooklyn, New York 11207
(212) 498-6300

CERTIFICATE OF SERVICE

I hereby certify that the attached Notice of Appeal and Application for a Stay have been served upon the following attorneys by delivering a true copy thereof to their respective offices:

SOLICITOR GENERAL
JUSTICE DEPARTMENT, ROOM 5614
DEPARTMENT OF JUSTICE BUILDING
WASHINGTON, D. C.

LEWIS TESSER, ESQ.
Assistant U. S. Attorney
225 Cadman Plaza
Brooklyn, New York

HARRIET F. PILPEL, ESQ.
Greenbaum, Wolff & Ernst
437 Madison Avenue
New York, New York 10022

ELLEN SAWYER, ESQ.
Room 1757
MUNICIPAL BUILDING
New York, New York 10007

SYLVIA A. LAW, ESQ.
40 Washington Square South
New York, New York

RHONDA COPELON, ESQ.
Center for Constitutional
Rights
853 Broadway
New York, New York

NADINE TAUB, ESQ.
American Civil Liberties
Union
22 East 40th Street
New York, New York

/s/ JOSEPH V. MOLITERNO



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

CORA McRAE, individually and on behalf of all others similarly situated; PLANNED PARENTHOOD OF NEW YORK CITY, INC.; and IRWIN B. TERAN, M.D., individually and on behalf of all others similarly situated,

Plaintiffs,

- against- 76-C-1804

F. DAVID MATHEWS, Secretary, United States Department of Health, Education and Welfare,

Defendant.

----------x

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Plaintiff,

76-C-1805

- against -

F. DAVID MATHEWS, Secretary, Department of Health, Education and Welfare,

Defendant.

MEMORANDUM AND ORDER

----------x

Appearances:

HARRIET F. PILPEL, Esq., FREDERIC S. NATHAN, Esq. LAWRENCE VOGEL, Esq. and EVE W. PAUL, Esq. (Messrs. GREENBAUM, WOLFF & ERNST of Counsel) for Plaintiff Planned Parenthood

SYLVIA A. LAW, Esq., RHONDA COPELON, Esq., and NANCY STEARNS, Esq. (Center for Constitutional Rights); JILL LAURIE GOODMAN, Esq., ELLEN LEITZER, Esq., JUDITH MEURS, Esq., and NADINE TAUB, Esq. (American Civil Liberties Union) for plaintiffs McRae and Teran, individually and on behalf of others similarly situated

ELLEN K. SAWYER, Esq., and JAMES G. GREILSHEIMER, Esq. (W. BERNARD RICHLAND, Esq., Corporation Counsel, of Counsel) for the New York City Health and Hospitals Corporation

LEWIS F. TESSER, Esq. (DAVID G. TRAGER, Esq., United States Attorney, of Counsel) for the Secretary



Appearances (continued):

JANET BENSHOOF, Esq., Attorney for National Medical Association, The National Association of Social Workers, The American Public Health Association, National Organization for Women, Legal Defense Fund, Planned Parenthood Federation of America, Inc., and Association of Planned Parenthood Physicians, as Amici Curiae

CLAIRE BIUNNO, Esq., for American Ethical Union, American Humanist Association, Americans United for Separation of Church and State, Board of Church and Society - United Methodist Church, Catholics for a Free Choice, Church of the Brethren, National Ministries - American Baptist Churches in the United States of America, National Women's Conference of the American Ethical Union, Office for Church in Society - United Church of Christ, Union of American Hebrew Congregations, Unitarian Universalist Women's Federation, The Young Women's

Appearances (continued):

Christian Association, United Presbyterean Church in the U. S. A.

LEONARD MANNING, Esq. (GERALD E. BODELL, Esq. and Messrs. BODELL & MAGOVERN, of Counsel) for James F. Buckley, Jesse A. Helms and Henry J. Hyde on the petition to intervene

A. LAWRENCE WASHBURN, JR., Esq. (Messrs. BODELL & MAGOVERN of Counsel) for ISABELLE M. PERNICONE on the Petition for appointment as guardian ad litem for unborn children as a class affected by the outcome of the suit.

DOOLING, D.J.

By these actions plaintiffs seek to invalidate Section 209 of Public Law 94-439, the Departments of Labor, Health Education and Welfare Appropriations Act, 1977; that section became law on September 30, 1976. It provides that:



> None of the funds contained in this Act shall be used to perform abortions except when the life of the mother would be endangered if the fetus were carried to term.

The Act is the general appropriation Act for the fiscal year ending September 30, 1977, and it includes provision for Medicaid reimbursement.

The part of the Conference Report on the bill dealing with Section 209 is quoted as saying (inter alia)

> It is not our intent to preclude payments for abortions when the life of the woman is clearly endangered . . . if the pregnancy were carried to term. Nor is it the intent of the conferees to prohibit medical procedures necessary for the termination of an ectopic pregnancy or the treatment of rape or incent victims . . .

* * *

The Congress is aware that there are three cases related to this issue to be heard by the Supreme Court this fall, and wishes to make clear that the Congress in its action on this particular appropriations bill does not intend to prejudge any constitutional questions involved in those cases.

It has been decided in this state that Medicaid reimbursement may not constitutionally be denied for "elective abortions" (Klein v. Nassau County Medical Center, E.D.N.Y. 1972, 1976, 347 F. Supp. 496, 409 F. Supp. 731), and it has been decided in this circuit that a state cannot constitutionally deny medical assistance to indigent women seeking "elective abortions" in the first trimester of pregnancy (Roe v. Norton, D. Conn. 1975, 408 F. Supp. 660). Both decisions arose specifically in the Medicaid context under state plans adopted under 42 U.S.C. 1396a. Both are on appeal in the Supreme Court.

The parties agree that there



is no material controversy about the facts. Plaintiffs show the following facts:

Plaintiff Cora McRae is a citizen and resident of New York in the first trimester of pregnancy and in consultation with a physician has decided to terminate her pregnancy. She is without means and relies on Medicaid for all medical care. Plaintiff Planned Parenthood is a non-profit New York corporation which provides family planning services and also, at state-licensed clinics, provides about 300 first trimester abortions each month for patients eligible for Medicaid. In the first six months of 1976 it provided 6,253 abortions of which 1,777 were for Medicaid patients for which billings were about $260,000. In 1975 it provided 2,202 abortions for Medicaid patients and received $288,636 in Medicaid reimbursement. Plaintiff Irwin B. Teran is a licensed physician who specializes in obstetrics and gynecology. About half of the patients he treats at his Bushwick office are Medicaid eligible and about one-quarter of the income of that office is derived from Medicaid reimbursements for first and second trimester abortions; he performs about three Medicaid abortions a

week. (The Medicaid reimbursement to Dr. Teran is $100 for each abortion, a sum much below the usual fee for such an operation.)

The individual plaintiffs and Planned Parenthood are each representative of many others similarly situated and who are similarly affected by the prohibition of the new enactment.

The New York Health and Hospitals Corporation is a public benefit corporation charged with the responsibility for providing comprehensive health and medical services for the people of New York City and with operating sixteen municipal hospitals, twelve of which perform abortions. The most recent statistics compiled show that in 1974 the municipal hospital system provided 10,324 abortions for Medicaid eligible persons. The Hospitals Corporation anticipates, reasonably, that if federal funding is denied, private physicians, voluntary hospitals and clinics will cease providing abortion service for those generally eligible for Medicaid because of apprehension that the withdrawal of federal funding will result in their not being reimbursed. The consequence will be a great



increase in the demand on the municipal hospitals for abortion services. Denial of federal funding will in turn diminish the municipal hospitals' capacity to render adequate medical care to their patients and in particular to indigent women lawfully seeking to terminate pregnancies. The municipal hospitals are not free under the law as they understand it to deny such abortion.

The municipal hospitals provide over half of all the ambulatory-patient care and emergency room visits provided in New York City and provide about 40 percent of all inpatient care furnished in the City. They provide annually three million days of inpatient care and nine million ambulatory-patient and emergency room visits. The municipal hospitals have provided elective abortions since July 1, 1970, following the enactment in its present form of Penal Law § 125.05. In the period before the Wade and Bolton decisions, from July 1, 1970 to January 1, 1973, the municipal hospitals performed 68,024 abortions for New York City residents; of these 33,914 were for patients who were eligible Medicaid. In the same period the voluntary and proprietary hospitals and the clinics

performed 112,672 abortions for city residents, of whom about 32,169 were Medicaid eligibles. In the two years following the Supreme Court decisions, the municipal hospitals performed 42,005 abortions for city residents, of whom half were Medicaid eligible; in the same period the voluntary and proprietary hospitals and the clinics performed 169,799 abortions for city residents, of whom 35 percent were Medicaid eligible.

New York City Department of Health Statistics record 830,780 abortions performed in the six years 1970-1975 of which 405,742 were performed for residents. (The number performed for nonresidents is still substantial but only a fraction of what it was in 1971 and 1972.) In the years 1970-1974 abortions performed in New York City for its residents were for the most part performed in the first trimester. In 1972-1974 over 83 percent were performed in the first trimester; in 1971 the percentage was 79 percent. In the same years over half the abortions were performed for non-whites and Puerto Ricans. Incomplete 1975 statistics record 81,426 abortions for residents of the city, 16,478 being performed in municipal facilities about half of which were



performed for Medicaid eligibles, representing Medicaid reimbursement of $2,306,920.

The New York Department of Social Services through its Commissioner has taken the position throughout the litigation in Klein v. Nassau County Medical Center, supra, that the State Medicaid plan does not provide reimbursement for any abortions except those which are "medically necessary." The Commissioner has appealed the decision in the Klein case requiring reimbursement to providers who perform abortions during the first twenty-four weeks from the commencement of pregnancy regardless of whether such abortions are medically necessary or not. The Commissioner's Administrative Letter 76 ADM-92 of September 3, 1976, directed local Social Service Commissioners to allow claims for legal abortions performed for Medicaid eligibles by qualified providers, and that

> . . . usual billing procedures shall be followed, and any bill for an abortion should be handled as a bill for a surgical procedure.

* * *

It should again be noted that abortions are not considered family planning procedures and therefore may not be claimed at the 90% Federal and 5% State reimbursement levels. They should be claimed at the usual reimbursement level of 50% Federal and 25% State share.

Title XIX of the Social Security Act was enacted in July 1965 for the purpose of "enabling each State, as far as practicable under the conditions in such State, to furnish . . . medical assistance on behalf of families with dependent children," and it authorized the annual appropriation for each fiscal year of a sum "sufficient to carry out the purposes" of Title XIX; sums made available under the authorization "shall be used for making payments to States which have submitted, and had approved by the Secretary of Health, Education and Welfare State plans for medical assistance." 42 U.S.C. 1396. Title XIX requires state plans to include a number of very specific provisions as a condition to approval by the Secretary



(42 U.S.C. § 1396a(a)(b)), and requires State financial participation equal, in New York's case, to 50 percent, matching the "Federal Medical Assistance percentage" of 50 percent - the statutory minimum for the federal participation. 42 U.S.C. §§ 1396a(a)(2), 1396d(b).

Section 1396h makes it a federal misdemeanor to make a false statement in an application for a payment under a State plan approved under Title XIX or to make or cause to be made a false statement of a material fact for use in determining rights to a payment under an approved State plan. It is also made a misdemeanor to solicit, offer or receive a kickback or bribe or a rebate of fee in connection with furnishing a service "to any individual for which payment is or may be made in whole or in part out of Federal funds under a State plan approved under" Title XIX.

New York in 1966 adopted Title 11 of the New York Social Services Law (Sections 363-369) to provide medical assistance for needy persons in pursuit of the state's goal of making available to everyone, regardless of race, age, national origin or economic standing,

uniform, high-quality medical care (Section 363). Title 11 was drafted in conformity with Title XIX of the federal act and Section 363-a required submission of the state plan to the Department of Health, Education and Welfare for approval. It was approved.

The Secretary contends first, that plaintiffs will suffer no harm from the enactment because the state under its law and, perhaps, under federal constitutional imperatives must continue to reimburse providers who perform lawful elective abortions. Cases, of which Klein v. Nassau County Medical Center, supra, and Roe v. Norton, supra, are typical, the argument continues, have required the states to grant such reimbursement under state law and regulations that conform to the requirements of Title XIX of the Social Security Act, and the state has complied. That the state may not obtain reimbursement does not, the Secretary asserts, discharge the state's responsibility under the State constitution (Article XVII, Section 1) to provide for the aid, care and support of the needy, a responsibility legislatively imposed on the public welfare districts which must discharge that responsibility even if the state



is not required to reimburse them. Jones v. Berman, 1975, 37 N.Y.2d 20-42, 54-55.

The argument overlooks the essential nature of the Medicaid legislation. The state and federal government are linked in a fiscal partnership to provide for medical assistance to the needy; the program is based on the federal initiative, and the funding is primarily federal (42 U.S.C. § 1396, 1396d(b)). The needy are citizens no less of the United States than of the states of their residence, and in the federal society of today the federal government is not a grantor of voluntary bonifications to the states, but a representative government discharging through state agencies its responsibilities to provide from the public revenues (the sources of which it has so largely preempted) for its own needy in the states of their residence, and with the administrative and fiscal assistance of the states. Counsel misread Burns v. Alcala, 1975, 420 U.S. 469; it says only that state plans are not required to provide assistance for the unborn children of the needy. The Court did not invalidate the regulation providing for the reimbursement of states which, like

New York (cf. Rankin v. Lavine, 4th Dept. 1975, 50 App.Div.2d 1091, 376 N.Y.S.2d 355) elect to pay benefits in respect of unborn children. But these are cases dealing with statutory interpretation, not with constitutional principle nor with the measure of responsibility directly to the needy which the national government assumed when, in Title XIX of the Social Security Act, it laid down the parameters of medical assistance for the needy of the nation. The states are not the beneficiaries of Title XIX but the agencies through which the national government secures medical assistance to the needy.

It follows that withdrawal of reimbursement for elective abortions lawfully performed by licensed providers is directly injurious both to the providers and to the indigent women who seek the abortional services. The providers are denied payment, by the hand of the state, of what the government is (assuming their basic contention is constitutionally correct) obligated to pay them from the appropriation for carrying out Title XIX of the Social Security Act. The indigent women, the recipients of the medical assistance which it is the purpose of Title XIX to



provide, have the interest of primary beneficiaries in the making of the payments, if their constitutional contention is correct.

The plaintiffs Planned Parenthood and Teran say that they will not, and the Hospitals Corporation shows that it will not long be able to, provide abortional service in the elective cases if the new enactment is valid and no federal funds are made available. It may well be that the state could find funds to assume the responsibility for making the payments, or that private charity could supply the abortional services. But that is no more than to say that if the national government unconstitutionally denies an entitlement, catastrophe need not ensue. The answer is that action if unconstitutional, is not tolerable, and is not made tolerable by the consideration that others may make good the harms inflicted by the unconstitutional default. The manifest fact is that Section 209 is calculated to stop the provision of abortional services from public funds; it is not calculated to shift the burden of providing this medical assistance to the states. Cf. Shapiro v. Thompson, 1968, 394 U.S. 618.

That the plaintiff providers have "standing" to sue is plain then, from Planned Parenthood of Missouri v. Danforth, 1976, 96 Sup.Ct. 2831, and Singleton v. Wulff, 1976, 96 Sup.Ct. 2868. The interest of the needy women is self-evident. And cf. Aguayo v. Richardson, 2d Cir. 1973, 473 F.2d 1090, 1098-1101.

It is argued that the judiciary has not the power of appropriation and that to declare Section 209 invalid and order that reimbursement for elective abortions continue would amount to exercising the power of appropriation in violation of Article I, Section 9, Clause 7, which provides that "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. . ."

Public Law 94-439 is an appropriation Act. Its enacting clause and relevant text read:

> Be it enacted . . ., That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Departments of Labor and



> Health, Education and Welfare, and related agencies, for the fiscal year ending September 30, 1977, and for other purposes, namely:
>
> * * *
>
> SOCIAL AND REHABILITATION SERVICE
>
> PUBLIC ASSISTANCE
>
> For carrying out, except as otherwise provided, titles I, IV, X, XI, XIV, XVI, XIX, and XX of the Social Security Act, and the Act of July 5, 1960 (24 U.S.C., ch. 9) $18,040,850,000, of which $56,500,000 shall be for child welfare services under part B of title IV.
>
> For making, after June 30 of the current fiscal year, payments to States under

titles I, IV, X, XIV, XVI, XIX and XX, respectively, of the Social Security Act, for the last three months of the current fiscal years (except with respect to activities included in the appropriation for "Work incentives"); and for making after July 31 of the current fiscal year, payments for the first quarter of the succeeding fiscal year; such sums as may be necessary, the obligations incurred and the expenditures made thereunder for payments under each of such titles to be charged to the subsequent appropriations therefor for the current or succeeding fiscal year.

In the administration of titles I, IV (other than part C thereof), X, XIV, XVI, XIX, and XX, respectively, of the Social Security Act, payments to a State under any such titles for any quarter in the period



beginning July 1, 1976, and ending September 30, 1977 may be made with respect to a State plan approved under such title prior to or during such period, but no such payment shall be made with respect to any plan for any quarter prior to the quarter in which a subsequently approved plan was submitted.

Such amounts as may be necessary from this appropriation shall be available for grants to States for any period in fiscal year 1976 and the period July 1, 1976 through September 30, 1976 subsequent to March 31, 1976.

* * *

Sec. 206. No part of the funds contained in this title may be used to force any school or school district which is desegregated as that term is defined in

title IV of the Civil Rights Act of 1964, Public Law 88-352, to take any action to force the busing of students; to force on account of race, creed, or color the abolishment of any school so desegregated; or to force the transfer or assignment of any student attending any elementary or secondary school so desegregated to or from a particular school over the protest of his or her parents or parent.

Sec. 207. (a) No part of the funds contained in this title shall be used to force any school or school district which is desegregated as that term is defined in title IV of the Civil Rights Act of 1964, Public Law 88-352, to take any action to force the busing of students; to require the abolishment of any school so desegregated; or to force on account of race, creed, or color the transfer of students to or from a



particular school so desegregated as a condition precedent to obtaining Federal funds otherwise available to any State, school district, or school.

(b) No funds appropriated in this Act may be used for the transportation of students or teachers (or for the purchase of equipment for such transportation) in order to overcome racial imbalance in any school or school system, or for the transportation of students or teachers (or for the purchase of equipment for such transportation) in order to carry out a plan of racial desegregation of any school or school system.

Sec. 208. None of the funds contained in this Act shall be used to require, directly or indirectly, the transportation of any student to a school other than the

school which is nearest the student's home, and which offers the courses of study pursued by such student, in order to comply with title VI of the Civil Rights Act of 1964.

Sec. 209. None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term.

Senators Buckley and Helms and Representative Hyde seek to intervene in support of the legislation in their interest as Members of Congress seeking to protect their votes in favor of the legislation from judicial nullification, and in their interest as citizen-taxpayers.

A legislator has a recognized right to sue to secure legal recognition of the effectiveness as an enactment of a bill for which he voted but which has - with arguable impropriety - been denied promulgation as a law (Kennedy v. Sampson, D.C. Cir. 1974, 511 F.2d 430), or to



annul a concurrent resolution on the ground that it had not in fact been adopted because one indispensably necessary vote was unauthorized in law (Coleman v. Miller, 1939, 307 U.S. 433). In such cases the right to sue derives from the legal injury done to the legislator's vote as integral to the process of enactment; the litigation is addressed to establishing the efficacy of the legislator's vote as a vote to be counted in the legislative process. But that clear right - in effect, to have his vote counted at its full legal value - is not involved here. No one has challenged the correctness of the process of enactment. The challenge is to the constitutional validity of one section of a correctly enacted law. To grant intervention on the ground of the members' participation in enacting the law would involve accepting as a principle that each member of the Congress has an interest to intervene in every case in which the substantive constitutionality of a provision in a federal enactment was drawn into question, or, indeed, in which the interpretation of a federal statute was in question. Cf.. Holtzman v. Schlesinger, 2d Cir. 1973, 484 F.2d 1307, 1315.

Flast v. Cohen, 1968, 392 U.S. 83, 102-103, although it dealt with an income-taxpayer's interest in preventing expenditure of public funds, would indicate the existence of a taxpayer interest in the present case, an interest to prevent a specific type of expenditure in contravention of a very specific statute. The Congress, it seems, had before it evidence, furnished by the Department of Health, Education and Welfare, that the Medicaid expenditure occasioned by full term births was several fold the expenditure for lawful abortion. But the taxpayer interest is rather in the legality of the expenditure than in private tax savings. The test is the immediacy and specificity of the citizen-taxpayer concern with the substantive principles involved in the challenged species of public expenditure. Flast v. Cohen can hardly be said to have been extended, but it has not been overruled, and it is concluded that the senators and the representative have brought themselves within it in their roles as citizen-taxpayers. It should be said that, were intervention not permissible, the assistance of the intervenors' papers as submissions of amici curiae would have been equally welcome.



The contention that an order requiring continued payment for lawful abortions would be an illicit attempt to appropriate funds from the Treasury cannot be sustained. The language of the Act makes clear that Congress has appropriated what it judges sufficient money for carrying out Title XIX and that it has sought only to restrict the circumstances in which the funds can be used to pay providers of lawful abortional services. If that prohibition of use transgresses constitutional rights, it cannot be given effect. Payment of funds will follow, but not by an act equivalent to appropriation. United States v. Lovett, 1946, 328 U.S. 303, dealt with a section of an appropriation act which, similarly, forbade the use of any part of the money appropriated by the Act for a specific purpose - in that case, the payment of salaries to three federal employees who had been accused of being "subversives." The Court held that the prohibitory section did not bar the payments of the employees' salaries because the section was unconstitutional as, in substance, a bill of attainder. Counsel for the Congress argued unsuccessfully the exclusive and complete control of the Congress over the disbursing process and that the issues

raised by the section were not justiciable. So here, the section is a constraint on the use of appropriated funds, and, if the constraint here is one that cannot be lawfully imposed for constitutional reasons, as it was in Lovett, then there is here no bar to the payment of the money for abortional services.

It is argued that it is improbable that the challenge to the validity of the Section 209 will succeed. It is contended that Section 209 fits a consistent pattern of affirmatively encouraging, and of requiring state plans to offer, family planning services and of excluding abortion from the array of licit family planning methods. And it is argued that Legion v. Richardson, S.D.N.Y. 1973, 354 F. Supp. 456, 414 U.S. 1058, holding valid so much of Title XIX as excludes federal grants for the long-term care of inpatients aged 21 to 65 in mental hospitals, signifies that exclusions from Medicaid coverage are not necessarily invalid. But the clear concern for making family planning available is not related to the issues raised by Section 209. That section is, ultimately, concerned with the denial of medical assistance to the needy. It is not validated by putting it in



juxtaposition with the federal encouragement of family planning, for it would appear put in that relation, as punitive, as a retributive act, not a simple, non-invidious decision not to provide a type of medical assistance. The section is aimed at conduct and is not oriented to need. Legion, in contrast, was found by the Court, in substance, to be a reasoned legislative decision not to extend Medicaid into the field of long-term inpatient treatment of the insane aged 21 to 65, and to be free of invidious discrimination in the making of that choice. The appeal there must be to the Congress and not to the courts.

The Court has made clear (Roe v. Wade, 1973, 410 U.S. 113, Doe v. Bolton, 1973, 410 U.S. 179) that the constitutionally protected personal rights of women include the right to terminate pregnancy in consultation with their physicians, and that the state's interest enters only in the second trimester, and is then extended only to taking measures to preserve and protect maternal health. Planned Parenthood of Missouri v. Danforth, supra, makes additionally clear that the state cannot require that a woman's spouse consent to abortion, nor require, in the case of

a woman under the age of eighteen years, that she obtain the consent of one parent to an elective abortion.

The cases in the District Courts and the Courts of Appeal which have invalidated efforts of certain of the states under their Title XIX plans to deny Medicaid reimbursement for elective abortions establish the probability that plaintiffs will prevail on the ultimate issue of merit. Klein v. Nassau County Medical Center, supra; Roe v. Norton, supra; Wulff v. Singleton, 8th Cir. 1974, 508 F.2d 511, rev'd in part, Singleton v. Wulff, supra; Doe v. Rose, 10th Cir. 1974, 499 F.2d 1112; Doe v. Westby, D. S.D. 1975, 402 F. Supp. 140; Doe v. Rampton, D. Utah 1973, 366 F. Supp. 189; Doe v. Wohlgemuth, W.D. Pa. 1973, 376 F. Supp. 173, aff'd, sub nom., Doe v. Beal, 3d Cir. 1975, 523 F.2d 611. (The Supreme Court will determine the issue.)

The women affected by the enactment of Section 209 are denied no other medical assistance; they are, as Medicaid eligibles, undeniably entitled to medical assistance in their pregnancies. Section 209, however, would deny them reimbursement for medical assistance only



if they elect to exercise their constitutionally protected right to terminate their pregnancies. Others who have the means to pay for medical services are free by virtue of our positive law to exercise their constitutional right to terminate their pregnancies, but the needy, the wards of government, would by this enactment be denied the means to exercise their constitutional right.

It does not alter the case to say that taxpayers ought not be called on to pay for abortional services, that their refusal, through the Congress, to do so, leaves the indigent woman free to exercise her constitutional right with the help of those who are willing to assist her. The freedom is unreal. It remains true that needed medical assistance is denied solely because the woman has chosen to exercise a constitutionally protected right. Section 209 will not in fact save public funds and so give relief to taxpayers, for as noted above, the Congress was advised that the alternative costs for medical assistance during prenatal care, at birth and after are very much greater.

It is undeniable that Section 209 expresses a strongly and widely held disapprobation of lawful abortion. The view is profoundly rational and espoused with religious fervor. It is neither purely sectarian nor identifiable with any political allegiance. But on this issue fundamental philosophical beliefs are in direct conflict. What some regard as denigration of the sanctity of human life others regard as involving no such matter, for the definition of human life is itself in debate (cf. Byrn v. New York City Health and Hospitals Corp., 1972, 31 N.Y.2d 194, appeal dismissed, 1973, 410 U.S. 949), and visualize opposition to lawful abortion as both inhumane and callously indifferent to the tragic lot of the unwanted child. Divisions between sober and God-fearing people so deep and equal deny to civil authority any power to intervene by direction or indirection, either to compel abortion as a measure of population control or to deny medical assistance to the needy who act on their own beliefs. When the power of enactment is used to compel submission to a rule of private conduct not expressive of norms of conduct shared by the society as a whole without substantial division it fails as law and inures as oppression.



The petition for the appointment of a guardian ad litem for unborn children raises, again, the primary contention that Roe v. Wade and the cases applying it have been wrongly decided, and that, in any event, in this new phase of the litigations the interests of the unborn should be represented. It is concluded that the contentions made for the class must be rejected. Nevertheless, the contention that the class should be represented may not be rejected; for that reason the right to intervene is granted, and the guardian's contentions have been considered.

It is argued that plaintiffs are not now harmed, may never be harmed, if the state pays for the abortions, and, therefore, are not entitled to relief by preliminary injunction. But in fact the apprehension of the providers is substantial, and the risk to the women seeking abortions is real. The harms are peculiarly irreparable in kind. The federal funding and planning is critically important. It is idle to suggest that the withdrawal of federal support and the lead the federal government has sought to take will not result in renewed efforts by the states to deny the needed medical assistance in these

cases. The two Central Services Unit, State of New Mexico, Memoranda (CSU-76-13, CSU MEMO 76-14) (attached to affidavit of Lewis Koplik sworn to October 15, 1976) illustrate the effect: on the enactment, the Unit announced that it would reimburse only for therapeutically necessary abortions; after restraining orders were entered, the Unit cancelled the first announcement and resumed reimbursement. The affidavit of Alfred F. Moran, sworn to October 15, 1976, shows that the office of the New York Commissioner of Social Services is not prepared to commit the Department to continued reimbursement if the federal payments are terminated. The affidavit of Steven Goldberg, sworn to October 15, 1976, is to the same effect. Without a continuance of the federal payments, it is clear that irreparable harm will be done to the indigent women involved. To continue the payments is to preserve the status quo until the rights involved are authoritatively determined.

This is not a case in which security is required. It is not usual to require it in the case of poor persons, and it would be inappropriate to require it of the Hospitals Corporation. Planned



Parenthood and Dr. Teran are in a different situation, but in this case no monetary harm is threatened. Rather the lawful abortional acts will operate to diminish Title XIX payments.

It is, accordingly,

ORDERED that

1. Plaintiff Cora McRae is entitled to maintain this action as a class action pursuant to Rule 23(a), (b)(1) and (2), on behalf of the class of pregnant or potentially pregnant Medicaid-eligible women in the State of New York, who, in consultation with their physicians, decide within twenty-four weeks after the commencement of pregnancy, to terminate their pregnancies by abortion;

2. Plaintiff Dr. Irwin Teran is entitled to maintain this action as a class action pursuant to Rule 23(a), (b)(1) and (2), on behalf of the class of duly licensed and Medicaid-certified providers of abortional services to Medicaid-eligible pregnant women;

3. The defendant, his successors in office, agents, servants, employees, attorneys, and those other

persons in active concert and participation with him who receive actual notice of this order by personal service or otherwise

A. Cease to give effect, in any way to Section 209 of Public Law 94-439, and cease from discriminating, in the provision of Medicaid payments, against women who choose or who have chosen abortion and in favor of women who choose or have chosen to carry their pregnancies to term; and

B. Continue to authorize and expend federal matching funds for abortions provided to women eligible for Medicaid at the proportionate level and in accordance with the standards under which they were being paid before enactment of Section 209 of Public Law 94-439, and treat requests for medicaid reimbursement for abortions performed for Medicaid-eligible women by duly certified providers on the same basis as they would requests for reimbursement for medical services and hospital care occasioned by carrying a pregnancy



to term;

C. Forthwith communicate the following notice to the Regional Directors of the Department of Health, Education and Welfare with instructions that they promptly disseminate this notice to all State Medicaid authorities within their region, with instructions to the State agencies that they in turn communicate this notice to all local Medicaid authorities, and providers (hospitals, doctors and clinics) of pregnancy-related care to Medicaid-eligible women. The notice shall read as follows:

> In conformity with the order of the United States District Court for the Eastern District of New York, entered October 22, 1976, which enjoins enforcement of the Hyde Amendment, the Department of Health, Education and Welfare will provide reimbursement for all abortions provided to Medicaid-eligible women by certified Medicaid providers on the same basis as

the Department pays
reimbursement for
pregnancy and child-
birth-related services.

Brooklyn, New York
October 22, 1976

/s/ JOHN F. DOOLING, JR.
United States District Judge



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

CORA McRAE, individually and on behalf of all others similarly situated; PLANNED PARENTHOOD OF NEW YORK CITY, INC.; and IRWIN B. TERAN, M.D., individually and on behalf of all others similarly situated,

Plaintiffs,

-against- 76 C 1804

F. DAVID MATHEWS, Secretary, United States Department of Health, Education and Welfare,

Defendant. O R D E R

----------x

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Plaintiff,

-against- 76 C 1805

F. DAVID MATHEWS, Secretary, Department of Health, Education and Welfare,

Defendant.

----------x

Upon the defendant's application for a stay pending appeal, it appearing that to stay the order pending appeal would accumulate the harms the suits have been brought to prevent, it is

ORDERED that the application for a stay pending appeal is denied.

Brooklyn, New York
October 25, 1976.

/s/ JOHN F. DOOLING, JR.
John F. Dooling, Jr. U.S.D.J.



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

CORA McRAE, individually and on behalf of all others similarly situated; PLANNED PARENTHOOD OF NEW YORK CITY, INC., and IRWIN B. TERAN, M.D., individually and on behalf of all others similarly situated,

Plaintiffs,

-against- 76 C 1804

F. DAVID MATHEWS, Secretary, United States Department of Health, Education and Welfare,

Defendant.

----------x

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Plaintiff,

-against- 76 C 1805

F. DAVID MATHEWS, Secretary, Department of Health, Education and Welfare,

Defendant.

----------x

DOOLING, D.J.

The Secretary has moved to amend the order of October 22, 1976, to provide that Medicaid reimbursement paid under the Order will be subject to recoupment if the Order is reversed on appeal.

During the hearing plaintiffs expressed apprehension that a preliminary injunction would accomplish nothing if it was implicit in it that, if the Secretary ultimately prevailed on the merits, all payments made while the injunction was in force would have to be returned by the providers of the medical services to the Government, directly or through the State. Plaintiffs indicated that in such case no abortional services could be expected to be performed pendente lite. Because the issue so raised then appeared both to involve a request that the court purport to determine the legal consequences of its own order, and also to deal with conjectural future circumstances, the issue was not passed on. The Secretary now argues that because the injunction is immediately effective and, in consequence, requires payments now to be made that may ultimately be determined to be



payments forbidden by valid law, the order should now be modified to provide that payments made in obedience to the order should be recoverable by the Secretary if perfect justice is to be done.

There would be much force to the Secretary's argument if this were a case between private litigants over property interests. It is not. For some three years and more the Secretary has, under Title XIX of the Social Security Act, granted reimbursement of Medicaid payments for lawful abortional services. The legislative history indicates that the Department of Health, Education and Welfare neither requested nor supported the enactment of Section 209 of Public Law 94-439. There was evidence from the Department before the Congress that no economy would be effected by the enactment of Section 209, but that on the contrary, Medicaid expenditures would tend to be increased. Section 209 was, nonetheless enacted, and, although it sought to reverse policy on a controversial issue known, to say the least, to raise grave constitutional questions, Section 209 was made effective immediately. The enactment is not a money-saving enactment. Compliance with

an injunction against action under it will not do monetary damage to the Secretary in his official capacity.

The argument then, is simply that the payments will, if the Secretary ultimately prevails, be shown to have been without warrant in law, and, therefore, should, like impounded payments under a challenged rate increase, be refunded at the end of the litigation. But the payments will not have been illegal. They will be payments lawfully made under court order for lawful services actually rendered. So long as the order is unreversed, there is no wrongdoing that could give rise retroactively to an equity of restitution. Nor is the reason far to seek. Section 209 is not concerned with money, but with private conduct. That indigent women may, pendente lite, be enabled to exercise a constitutional right is not a wrong nor does it waste federal funds.

To grant the relief now sought might well, as plaintiffs contend, be tantamount to denying the preliminary injunction. But the injunction was granted on a finding of probable ultimate success in the litigation.



Granting the injunction, because of the constitutional probability and the irreparable harms threatened by Section 209, meant granting effective relief, not making a symbolic gesture. Because it was not the final judgment, the Memorandum did not explicitly hold that Section 209 was unconstitutional. So much, however, is implicit in the granting of the injunction in the terms in which it had to be granted if it was to be efficacious.

So far as concerns the plaintiff McRae and the class she represents, the present application is equivalent to requesting security under Rule 65(c). In such cases as this the imposition of the impossible is not required. Cf. Bass v. Richardson, S.D.N.Y. 1971, 338 F. Supp. 478, 489-491.

Accordingly, it is

ORDERED that the motion to amend the Order of October 22, 1976, is denied.

Brooklyn, New York
October 29, 1976.

/s/ JOHN F. DOOLING, JR.
John F. Dooling, Jr. U.S.D.J.



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| DENISE DOE, et al., | ) | |
| | ) | |
| Plaintiffs, | ) | |
| | ) | |
| v. | ) | Civil Action |
| | ) | No. 76-1835 |
| F. DAVID MATHEWS, | ) | |
| Secretary of Health, | ) | |
| Education and Welfare, | ) | |
| et al., | ) | |
| | ) | |
| Defendants. | ) | |

OPINION AND ORDER

SIRICA, D.J.

This action has been brought by a number of women residents of the District of Columbia and Virginia, a doctor and a clinic to injoin the Secretary of Health, Education and Welfare from complying with a provision of a federal appropriations statute. The provision, known as the Hyde Amendment, Labor-HEW Appropriations Act, Pub. L. No. 94-439, § 209 (Sept. 30, 1976), prohibits the Secretary of Health,

Education and Welfare ("HEW") from using any money appropriated to him for the fiscal year beginning October 1, 1976, "to perform abortions except where the life of the mother would be endangered if the fetus were carried to term." This limitation would apply to funds appropriated for Medicaid, and, as persons eligible for Medicaid benefits or as recipients of Medicaid funds, the plaintiffs claim it is unconstitional.

I.

The operation of Medicaid is primarily governed by Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq. (1970), as amended, (Supp. V., 1975), and by regulations promulgated thereunder. Basically, it is a system whereby the federal government undertakes to help the states and the District of Columbia [1] pay for the

[1] Under D.C. Code § 1-267 (1973), the District of Columbia is authorized to set up a medical assistance program under Title XIX.



medical needs of their poor residents. To qualify for this aid, a jurisdiction must establish a medical assistance program to pay for a certain minimum number of medical services for its "categorically needy" residents. See 42 U.S.C. § 1396a(a)(13)(B) (1970); 45 C.F.R. § 249.10(a)(1) (1975). Beyond that, a jurisdiction can also obtain more federal aid if it wishes to pay for certain additional medical services for the categorically needy and other "medically needy" as well. See 42 U.S.C. § 1396a(a)(10)(B) (1970); 45 C.F.R. § 248.10(d)(1) (1975).

Both of the jurisdictions which are relevant in this case -- the District of Columbia and Virginia -- have chosen to set up medical assistance programs for their medically needy residents under Title XIX. Both, in their program plans that have been approved by HEW, have undertaken to pay for, among other things, inpatient and outpatient hospital services, physician services administered in the hospital, office, home or elsewhere, clinic services, and family planning aid. See Dep't of HEW, Medicaid Services State by State (June 1, 1976). Both, in the

past, have in general paid for abortions under these plans.

For its part, the federal government under Title XIX undertakes to reimburse participating jurisdictions for all the necessary medical expenses incurred in the administration of the local medical assistance program, but only to the extent of certain percentages, which vary depending on the service, and only to the extent of money appropriated by Congress for the purpose. 42 U.S.C. § 1396b (1970). As the system works in practice, the federal government every quarter makes advance payments to each participating jurisdiction. That payment is intended to approximate the expenses the particular jurisdiction will incur under its medical assistance program during that period. If the payment in fact exceeds or is less than the actual expenses incurred, an appropriate adjustment is made in the following quarter's advance. 45 C.F.R. § 201.5 (1975). On October 1, 1976, a new quarter began, and advance payments were presumably sent out at that time in accordance with the limitation imposed by the Hyde Amendment.



Seen in this light, the Hyde Amendment appears to be simply a limitation on the federal government's undertaking under Title XIX to reimburse the jurisdictions participating in the Medicaid program. And the limitation is a narrow one, for the legislative history of the Amendment makes clear that Congress only intended to prohibit payment for abortions done as a "method of family planning or for emotional or social convenience." H.R. (Conf.) Rep. No. 94-1555, 94th Cong., 2d Sess. 3 (1976).

II.

This suit was filed on October 1, 1976, the day after Congress passed the Labor-HEW Appropriations Act over the President's veto, and the day the Act became effective. Joined as plaintiffs at the present time are six women, [2] a doctor who regularly

---

2/ Three women who have not yet had abortions moved to intervene as plaintiffs shortly after suit was instituted.
(continued on next page)

performs abortions, and a clinic at which abortions are often performed.

Three of the female plaintiffs are now pregnant; as of October 8, 1976, one was six weeks, another seven weeks, and the third was twelve weeks pregnant. Each of these plaintiffs is a resident of the District of Columbia and is eligible for Medicaid benefits under the D.C. medical assistance program. Each would like to have an abortion either for emotional or social convenience or for family planning reasons, but claims that she may not be able to because the Hyde Amendment prevents the use of Medicaid funds for such abortions and because she may not be able to afford to pay for the operation herself.

The other female plaintiffs have already had abortions, all for emotional or social convenience or for family planning reasons; all had them on September 23, 1976. These women were

---

(2/ continued)
Since the government does not oppose this, leave to intervene is hereby granted.



between five and seven weeks pregnant at the time the operations were performed. Two of them are residents of the District of Columbia and one is a resident of Virginia. Each is eligible for Medicaid under her local medical assistance program, but none has yet received notice that her abortion was paid for through that program. These plaintiffs concede that this in itself does not mean much, however, since the local medical programs normally take six to eight weeks to pay for the medical services rendered under Medicaid. But nevertheless, they claim that, since their reasons for having the abortions would not permit federal funds to be spent on their abortions, the local medical assistance programs will not pay for their operations. These plaintiffs have not alleged, however, that each will be personally liable for the cost of her abortion if the local jurisdiction does not pay for it.

The seventh plaintiff is Milan Vuitch, M.D. He has performed and supervised abortions in the past on women eligible for Medicaid and would like to continue to do so in the future. The plaintiff Laurel Clinic, Inc., is

an abortion clinic of which Dr. Vuitch is the medical director. The abortions that have already been performed on the female plaintiffs in this case have been done by Dr. Vuitch or under his supervision at the Laurel Clinic. Neither Dr. Vuitch nor the clinic has yet been paid for the three abortions that have been performed and, they claim, neither will be paid.

All of the plaintiffs make the same basic claim, namely, that the Hyde Amendment impermissibly burdens the right of the female plaintiffs to exercise their fundamental right under Roe v. Wade, 410 U.S. 113 (1973), to decide for themselves, in consultation with their physicians, whether or not to have abortions, and unreasonably discriminates against the exercise of that right by continuing to allow federal funds to be spent for other medical services and for childbirth care. This, they claim, violates the Due Process Clause of the Fifth Amendment of the U.S. Constitution.[3/]

---

3/ The plaintiffs have not explicitly limited their claims to any of the trimesters of pregnancy. It does not
(continued on next page)



To obtain relief, the plaintiffs have sued the Secretary of HEW, who is the one in control of the federal funds appropriated for disbursement under Medicaid, to obtain an injunction preventing him from limiting his disbursements as provided in the Hyde Amendment.[4/]

On October 1, 1976, Judge Waddy issued a temporary restraining order to preserve the status quo in this case until a hearing could be held.

---

(3/ continued)
appear, however, that abortions can legally be performed in the District of Columbia or Virginia during the final trimester of pregnancy except under conditions which the federal government would in any event continue to support even under the Hyde Amendment. The Court will presume that the plaintiffs wish to limit their claims to persons six months pregnant or less.

4/ A number of persons have sought to intervene as defendants. Given the disposition of this case, the Court need not address these motions.

On October 12, 1976, this Court held a hearing on the plaintiffs' motion for a preliminary injunction and extended the temporary order for nine days so that it could consider the arguments of the parties. The Court has carefully considered the arguments made and the memoranda filed by all parties and concludes that the order must be dissolved.

## III.

In addressing the issues raised in this case, the Court is not called upon to determine whether abortions performed during the first six months of pregnancy or at any time, are or are not proper; it has simply been asked to decide what the federal law on this subject is. But the Court has concluded that it cannot answer even this limited question, since, in its view, the plaintiffs have not alleged a "case or controversy" over which this Court is permitted, under Article III of the Constitution, to exercise jurisdiction.



### A.

The policies that a court must consider in determining whether a party has presented a justiciable "case or controversy" have until recently been somewhat unclear. For some years, the principal focus of attention was on whether the plaintiff had alleged an injury of such dimension, of such imminence, and of such a personal nature as to assure the "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions." Baker v. Carr, 369 U.S. 186, 204 (1962).

Recent Supreme Court cases have indicated that a second and overriding policy must also be considered. That policy is to insure that a court stays within the bounds placed on it by the constitutional scheme of the separation of powers. The focus of this inquiry is on the relief which the court is able to give and on the effectiveness of that relief in given circumstances.

To date, the cases which have specifically dealt with this second policy have been concerned with the standing

aspect of jurisdiction under Article III. E.g., Simon v. Eastern Kentucky Welfare Rights Organization, 48 L.Ed.2d 450 (1976); Singleton v. Wulff, 49 L.Ed.2d 826, 839 n.3 (1976) (Powell, J., concurring and dissenting). These cases make clear that before a court may exercise jurisdiction, the plaintiff must show to a "substantial likelihood" that if he is victorious in the suit and relief is granted, he will not suffer the injury he fears. Simon v. Eastern Kentucky Welfare Rights Organization, supra, at 465.

Without a doubt, a similar inquiry must be made with regard to the ripeness aspect of jurisdiction under Article III. If that is so, then a plaintiff must also show to a "substantial likelihood" that if relief is denied, he will in fact suffer the injury he fears. This is precisely the thrust of the Supreme Court's recent discussions on ripeness in O'Shea v. Littleton, 414 U.S. 488, 493-99 (1974), and in Rizzo v. Goode, 46 L.Ed.2d 561, 570 (1976).



B.

As noted in Part II above, the interest which the plaintiffs here claim is being or will be injured is that of the freedom of these women to decide for themselves, in consultation with their physicians, whether or not to have abortions. The injury they claim is that the Hyde Amendment will prevent the use of federal Medicaid funds to pay for their abortions and that this will prevent the District of Columbia and Virginia from providing any funds under their medical assistance programs for their abortions; physicians, in turn, will then refuse to perform abortions on them unless they promise to pay for the operations themselves. This, they claim, will burden or perhaps deny altogether their freedom of choice on whether or not to have abortions; and, given the fact that other medical services and also childbirth care will continue to be available, this works a discrimination against them in the exercise of that freedom.

The Court may assume for the sake of argument that, if an injury is imminent, at least those plaintiffs

who are still pregnant having standing to sue to prevent it. But the Court does not believe that the injury those plaintiffs allege is in fact imminent enough to present the requisite "case or controversy."

The most troublesome link in the plaintiffs' chain of causation is the allegation that both the District of Columbia and Virginia will refuse to pay for those abortions for which the federal government will not reimburse them. The Court specifically asked counsel for the plaintiffs about this link at the oral hearing. (Transcript at 10,33.) Counsel was unable at that time to answer the Court's questions satisfactorily, and the Court gave plaintiffs five additional days in which to submit additional argument on this point. Subsequently, they submitted a number of statements of officials of various states, but not of Virginia or the District of Columbia. One, a Maryland official, states that that state has no plans to pick up the cost of abortions such as are at issue here should the Hyde Amendment go into effect. An official from Georgia says that it is "very unlikely" that it will be able to absorb the added costs of paying for



such abortions completely on its own. A Dr. Baird of Minnesota states that, in his opinion, he has no authority to disburse funds for abortions solely out of state funds. State officials in California, Colorado and South Carolina say much the same thing.

The plaintiffs also allege that in Texas the state constitution forbids grants for medical care when federal matching funds are unavailable.

None of these statements, it should be noted, purports to be a binding statement on the legal obligations of the state by an official or body authorized to make such statements.

The relevance of all this to this case presumably is that officials in the District of Columbia and Virginia would say something similar. But the Court can hardly infer from these statements that there is a "substantial likelihood" that the District of Columbia and Virginia will withhold payments to the plaintiffs.

However, even if the Court took a more favorable view of these statements than it does, and accepted

as proven that the relevant jurisdictions will refuse to make the payments themselves, this would not wholly answer the question. For, as indicated in Part I above, both the District of Columbia and Virginia have undertaken, under their local plans, to pay for abortions in situations such as are contemplated in this case. Until amended, these plans continue in force and no change is authorized in the level of services which must be provided. 45 C.F.R. § 201.3 (1975). Nor can the level of services called for in the plans be reduced before recipients are given "timely and adequate" notice of the change. 45 C.F.R. § 206.10(a)(7) (1975). Since it does not appear that the District or Virginia has either moved to amend its plan or taken "proposed action to discontinue, terminate, suspend or reduce assistance" related to the treatment of pregnancy, id., they may well be legally obligated to continue to pay for these abortions under their Medicaid plans.

Nor have the plaintiffs alleged that the District of Columbia and Virginia are free to discontinue paying for abortions under Title XIX.



In Doe v. Beal, 523 F.2d 611 (3d Cir. 1975) (en banc), cert. granted, 96 S. Ct. 3220 (1976), the Court of Appeals for the Third Circuit held that Title XIX commands the states to fund abortions in situations where, as here, the jurisdiction has decided to pay for the health care of women who elect to give birth to a child. True, Beal was decided before the Hyde Amendment became effective. But the effect of this provision on that case may not be significant, especially since Title XIX only binds the federal government to reimburse the states "[f]rom the sums appropriated therefor." 42 U.S.C. § 1396b(a) (1970). A state, then, may have assumed the risk, in setting up its medical assistance program, of in fact paying for a somewhat greater share of the cost of the program than it might have originally anticipated. Certainly, plaintiffs have made no showing to the contrary.

Finally, the plaintiffs have failed to suggest that Virginia and the District of Columbia are free to refuse to pay for these abortions under the U.S. Constitution. Several courts have held that the states participating in the Medicaid program are under a

general constitutional obligation to fund abortions on an equal basis with other medical care and with childbirth care. Roe v. Norton, 408 F. Supp. 660 (D. Conn. 1975), prob. juris. noted sub nom. Maher v. Roe, 96 S. Ct. 3219 (1976); Doe v. Rampton, 366 F. Supp. 189 (D. Utah 1973). True again, these cases were decided before the Hyde Amendment became effective, but again, it is not clear that this would change the result in those cases either.

Despite all these contingencies, the plaintiffs have nevertheless suggested that, whatever the District of Columbia and Virginia may do, and whatever they may be obligated to do, the fact remains that physicians are not now likely to perform abortions for women such as those in this case because of fears that these jurisdictions would not reimburse them for the operations. But for all that appears on the record, this may simply be because the physicians are ignorant of how the Medicaid system works and of what the legal obligations of the District of Columbia and Virginia might be.

In sum, the plaintiffs simply have not shown that if relief is denied in this case they will suffer



an injury of any substance whatsoever. The Court therefore concludes that the plaintiffs have not alleged a ripe "case or controversy" over which this Court can constitutionally exercise jurisdiction.

IV.

For all of the above reasons, the Court also holds that the plaintiffs have not alleged that the injury they fear is so imminent as to require the exercise of the Court's equity jurisdiction. See O'Shea v. Littleton, 414 U.S. 488 (1974). But one additional consideration bolsters this determination. It is a matter of strict federal policy that courts avoid deciding questions of federal constitutional law when it is reasonably possible that an alternative nonconsitutional ground exists for reaching the same result. Ashwander v. TVA, 297 U.S. 288, 345-48 (1936). Cf. Singleton v. Wulff, 49 L.Ed.2d 826, 833, 839 n.3 (1976). This principle applies in this case. As indicated in Part IIIB above, there is a fair possibility that a court

can avoid deciding the difficult question of whether the federal government can constitutionally refuse to contribute to the performance of certain abortions by construing local medical assistance plans or a federal statute. Of course, this Court does not have the power in this case to indicate whether in fact that constitutional issue can be avoided or not. But since the plaintiffs here can be left to that recourse without any apparent injury to them, this Court finds that, as a matter of equity jurisdiction also, this case should be dismissed. See O'Shea v. Littleton, supra.

V.

For the reasons indicated above, it is this 21st day of October, 1976,

ORDERED that this action be, and the same hereby is, dismissed for lack of jurisdiction.



JOHN J. SIRICA
United States District Judge

FILED
Oct. 21, 1976
JAMES F. DAVEY, Clerk

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
Civil No. 76-1912

JANE DOE, individually and on behalf of all others similarly situated; Planned Parenthood Assoc. of Hudson County, Inc. and Robert M. Livingston, M.D., William H. Hayling, M.D. and Herbert Holmes, M.D., individually and on behalf of all others similarly situated.

v.

F. DAVID MATHEWS, Secretary, United States Department of Health, Education and Welfare,

---

Decided October 1, 1976

O P I N I O N

---

Appearances:

Nadine Taub, Esq., Newark, Attorney; Harriet F. Pilpel, Esq., Frederic S. Nathan, Esq., Laurance Vogel, Esq., Greenbaum, Wolff, &Ernst, Esqs., Sylvia A. Law, Esq., Rhonda Copelon, Esq., Nancy Stearns, Esq., Jill Laurie Goodman, Esq., and Judith Mears, Esq.,(all New York,) of counsel with plaintiffs.

Jonathan L. Goldstein, Esq., U.S. Attorney; William D. Staehle, Esq. Assistant U.S. Attorney; Z. Lance Samay, Esq., Assistant U.S. Attorney (all of Newark), for defendant.



BIUNNO, District Judge

This case is before the court on an application for an order to show cause, with temporary restraint, why the defendant Mathews (Secretary of the U.S. Department of Health, Education and Welfare, HEW), should not be enjoined pendente lite from enforcing the so-called "Hyde Amendment", a provision of the Appropriations Act for the Department of Labor and HEW. That act, embodying the Hyde Amendment, evidently became law on September 30, 1976 by virtue of the vote, in both Houses of Congress (67 to 15 in the Senate, and 312 to 93 in the House) to override a presidential veto of the bill, see U.S. Const., Art. I, §7, cl. 2, requiring a two-thirds vote for that purpose.

The law involved is an appropriations law, for the two departments mentioned, covering the new fiscal year October 1, 1976 through September 30, 1977. The portion of that law which is challenged, the Hyde Amendment, is a single sentence which reads:

> "None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term."

Taken literally, the language may be said to be inapt, and so requires construction. No funds are "contained" in any Act; funds are contained only in the Treasury. Nor are funds "used" to "perform" abortions; instruments, medications or other means may be used to "perform" abortions and funds are pertinent only to the extent that they are payment for the application of those means. In all that follows, the sense and meaning of the challenged sentence will be taken as the equivalent of saying that:

> "No appropriation made by this Act is authorized by law to be paid for performing abortions, except where the abortion is medically indicated to avoid endangering the life of the mother if the fetus were carried to term."

Read in this sense, the claim advanced is that the Hyde Amendment is unconstitutional in respect to(a) females who are or may become pregnant, who are otherwise eligible for medical and hospital services for pregnancy under the Medicaid laws, and who desire abortions for which the appropriation act does not appropriate



federal funds by virtue of the Hyde Amendment; (b)physicians who provide abortions to pregnant females desiring them and who receive payment therefor under the Medicaid laws;(c) the Planned Parenthood of Hudson County, Inc.,(PPHC), a N.J. non-profit corporation, which operates a clinic (the Hudson Health Center) at which first trimester abortions are performed, and which receives payment therefor under the Medicaid laws.

On behalf of these 3 sets of plaintiffs, a total of 7 causes of action are set out in the complaint. These subdivide as follows:

For the plaintiff Jane Doe, the First, Second, Third, Fourth and Seventh causes of action assert that the restriction of the Hyde Amendment creates an invidious discrimination (as between one who can afford elective abortions without Medicaid and one who cannot); deprives her of the right to control her own person as well as of the rights of privacy and liberty in matters relating to marriage, sex, procreation and the family; coerces her (in future) to be irreversibly sterilized rather than risk a pregnancy that cannot be aborted; and constitutes an establishment of religion. These effects are claimed to violate the First, Fourth, Fifth and Ninth Amendments.

For the plaintiff physicians, the Fifth Cause of Action asserts that pregnant women consult them, and for many of such women they would, "in the exercise of their best professional judgment, concur in the women's decisions" to have an abortion performed and would so perform. The Hyde Amendment, as to physicians, is said to deprive them of their"right to practice

medicine in accordance with their best medical judgment"; would deprive them of their right to give(and their patients to receive) "appropriate and adequate medical treatment and advice" relating to whether to terminate a given pregnancy; and would deprive them of their right to receive substantial income from abortion services rendered to Medicaid patients in violation of their right to receive fees for such services. These effects are said to violate the First, Fourth, Fifth and Ninth Amendments.

For the plaintiff PPHC, the Sixth Cause of Action says that denial of reimbursement for abortions for Medicaid patients would prevent it from continuing its program for such services and deprive it from receiving fees therefor. This is said to violate the Fifth Amendment.

## OUTLINE OF THE MEDICAID PROGRAM

The complaint, the moving papers and the brief for plaintiffs focus on the challenges to the Hyde Amendment, with scant discussion of the structure and working of the Medicaid laws. Yet, to provide perspective to the claims made, some basic context of the law within which the particular and detailed conflict occurs is essential. What follows is the court's general understanding of that basic context.

The Medicaid law was passed in 1965 as a supplement(Title XIX) to the Social Security Act, 42 USC 1396a. This enabling legislation contemplates a program under which the States may enact Medicaid statutes and adopt plans to pay for various kinds of health services(i.e.,



medical, hospital, dental, pharmaceutical, prosthetic, optometric, etc.), part of the cost of which is reimbursable to the States by the federal government.

No State is obliged to enact a Medicaid law or plan. If it does, it must at least enact a law to pay for Medicaid services to all persons eligible for welfare(categorical aid), the eligible services to meet a specified minimum enumeration. If a State enacts no Medicaid law, or enacts one not meeting the minimum Title XIX requirements, it is potentially not eligible for reimbursement of any of the costs of its own program.

A State may also elect to enact an expanded Medicaid law to provide payment for health services not only to benefit those eligible for welfare benefits, but also to others, not so eligible, who are medically indigent or needy; i.e., their income is too high to qualify for welfare benefits, but is not high enough to be able to meet some kinds of health expenses. The kinds of services which a State may choose to pay for if it covers the medically needy is more flexible than those to be provided for those eligible for welfare benefits.

Obviously, the structure of the Medicaid program is one that is more limited than the kinds of publicly financed health programs that have been enacted in England and the Scandanavian countries, for example. Also, it is a program designed to stimulate the States, rather than the federal government, to adopt health care programs. The stimulus is the "carrot" of partial federal refunding. States might hesitate to enact a health services law by themselves in

view of the potentially enormous cost, and the difficulty of administering and controlling problems of eligibility, utilization and the like. The receipt of a federal share to help meet the direct and administrative costs has induced some States to enact Medicaid laws. New Jersey is one of them, P.L. 1968, c. 413, NJSA 30:4D-1 et seq.

Unlike the privately developed and operated health plans, such as the well-known Blue Cross/Blue Shield programs, the Medicaid program makes no general attempt to sign up in advance "providers" of services who agree to accept stipulated amounts or rates for stipulated services. The arrangement, rather, is more akin to indemnity health insurance, where the amount paid by the carrier is stipulated according to some standard or schedule (which is actuarially reflected in the premium), leaving it to the insured to find a provider of the services.

Such a system necessarily requires that a State which enacts a Medicaid law set up some rather sophisticated administrative machinery. The program involves the expenditure of public funds obtained from taxpayers at both State and national levels. The funds paid out may only be paid for the benefit of those who are eligible, for services that are authorized and in fact rendered, and in amounts that are proper. Some Medicaid programs are administered by the State with public employees. Others have contracted for administration with private carriers who are experienced and equipped to handle the work as an adjunct to their own highly similar



work or to other contracted services for related programs such as Medicare.

In any event, an applicant for benefits is first found eligible by some designated agency of the State, is enrolled, and is issued some kind of identification card. When services are needed, the enrolled person seeks out a provider willing to accept the authorized Medicaid amount as full payment for the service, and receives the service. The provider then bills the State, through some administrator who reviews the claim and if found proper, pays it on behalf of the State. In turn, the State takes the data on paid claims to HEW as a basis for claiming reimbursement of the federal share.

At this writing, the court has not had furnished to it a copy of the law enacted by Congress, one part of which is challenged. It has been told that the Statute involved is the appropriations law for the new fiscal year October 1, 1976 through September 30, 1977, to which the Hyde Amendment was added as a "rider", it is said. The materials submitted do not reflect the legislative history. One reference indicates that the amendment became §209 of "H.R. 14232." Another reference is to a Conference Committee Report on "H.R 14323, attached hereto as Appendix A", but which is not attached at all.

Whether the Hyde Amendment is a "rider" (a term usually describing a provision of law unrelated or not germane to the bill to which it is attached) or a floor amendment, is by no means clear. In any event, whatever the legislative mechanism was, the challenged provision is claimed to have been passed by both Houses of the Congress, sent to the President who vetoed the entire bill, and enacted into law by a two-thirds vote of both Houses of Congress. The Constitution of the United States does not require the Congress to limit each Bill to one object, or to state that object in its title. It does not extend to the President the authority to veto one or more items in an appropriations law, or to the Congress the authority to override the veto of one or more of such items. It does not authorize the mechanism of the conditional veto. 1/ A bill either becomes law, as a whole, or it is no law at all.

What is significant about this analysis is that if it be true that the Hyde Amendment is part of the appropriations act for fiscal 1977, it is not an

---

1/ See, for example, N.J. Const., 1947, Art. 4, §7, par. 4 (single object and title); Art. 5, §1, par. 15 (line item veto of appropriations bills); Art. 5, §1, par. 14(b)(3)(conditional veto).



amendment of any part of Title XIX of the Social Security Act. The importance of this will become apparent.

THE STATUS OF THE NEW JERSEY PROGRAM

As noted above, New Jersey has enacted a Medicaid law. It has also enacted legislation that precludes payment under the program for elective or non-therapeutic abortions, P.L. 1975, c. 261, NJSA 30:40D-6.1.

Despite this provision, New Jersey was directed to continue making such payments under the terms of a preliminary injunction entered in the case of Doe v. Klein, Civ. No. 76-74(GHB),U.S. District Court, District of N.J.(unreported). That preliminary injunction was issued in light of the decision in Doe v. Beal, 523 F. 2d 611(CA-3, 1975), cert. granted, July 6, 1976. The Beal case involved a parallel restriction in the Medicaid law of Pennsylvania, and the ruling of the Court of Appeals was grounded on the proposition that, having elected to enact a Medicaid law, the exclusion of abortion services was not among the options available to Pennsylvania. The Court of Appeals explicitly chose to reach its decision on statutory construction grounds rather than on constitutional grounds, on the long-established principle that constitutional issues are not reached in any

case where the matter can be decided on other grounds. 2/

The statute relied on by the Court of Appeals in Beal was the Medicaid law, Title XIX of the Social Security Act, 42 USC §1396a. That statute was not amended or affected by the Hyde Amendment. Title XIX remains in force, as it stood when Beal and Klein was decided. The Hyde Amendment affects the federal appropriation to HEW for fiscal 1977, and its application is limited to the treatment of items of cost incurred by a Medicaid State for which federal funds can be paid to that State. It has no application to the kinds of items for which a State must pay if it has enacted a Medicaid law.

For this reason, as well as for the reason that the preliminary injunction in Doe v. Klein has not been modified, the NJ Commissioner of Institutions and Agencies(Klein), who presumably administers New Jersey's Medicaid law, remains obliged to continue to pay for medical, clinic and hospital services for elective abortions, even though New Jersey may not be entitled to receive federal fund support for the costs in-

2/ The Court of Appeals followed the policy indicated by the Supreme Court in Hagans v. Levine, 415 U.S. 528 (1974); Westby v. Doe, 420 U.S. 968 (1975).



curred under the general appropriation law, if the Hyde Amendment is valid.

Alternatively, it is open to Commissioner Klein to advance the argument that denial of a federal share payment for these costs under the Hyde Amendment provides a basis for lifting or modifying the preliminary injunction issued in Doe v. Klein, The court can only note this potential issue. It cannot deal with it because Commissioner Klein is not a party to the suit.

Plaintiffs could have sought leave to file a supplemental complaint in Doe v. Klein, to advance the challenge to the Hyde Amendment, to bring in at least Secretary Mathews of HEW as an additional party, and to advance alternative claims (a) that the Hyde Amendment is unconstitutional and(b) that even if valid, Commissioner Klein remains obliged to pay for elective abortions even though the federal share is cut off, on the theory that Title XIX remains in full force and effect.

Plaintiffs chose to file an independent suit, to which Commissioner Klein is not a party. Since the basic obligation to pay for Medicaid services is evidently a State obligiation, under the pattern of the law, the failure to join Commissioner Klein leaves out an indispensable party. This litigation

strategy also has the effect of attempting to compel the court to deal with a constitutional claim when the underlying right of all the plaintiffs might well be decided on statutory grounds, without reaching any constitutional issue, as it is bound by law to do if it can.

For the failure to join an indispensible party, no temporary restraining order can be granted.

THE APPROPRIATIONS LAW ASPECT

In challenging the constitutional validity of the Hyde Amendment, plaintiffs rely on the ruling in Roe v. Wade, 410 U.S. 113(1973) and a group of federal decisions concluding that States that adopt Medicaid laws must pay for the cost of elective abortions, at least for those eligible for categorical aid. Some of these decisions are said to rest on constitutional grounds,while others rest on statutory construction of the Social Security Act.

One of these, Klein v. Nassau County Medical Center, 347 F. Supp. 496 (E.D.-N.Y., 1973) was vacated and remanded, 412 U.S. 924-5, for reconsideration in light of Roe and Doe. The decision after remand is in 409 F. supp. 731 (ED-NY, 1976), and appeal was docketed May 27, 1976 as No. 75-1749. Another



is Roe v. Norton, 408 F. Supp. 660(D. Conn. 1975), prob.juris. noted July 6, 1976 as Maher v. Roe. The third is Doe v. Beal, in this circuit, 523 F. 2d 611(CA-3,1975), cert. granted July 6, 1976. The fourth is Poelker v. Doe, 515 F. 2d 541(8th Cir. 1975),cert. granted 1976.

All of these cases, and others relied on as well, dealt with State restrictions on payment for elective abortions. Roe v. Wade, 410 U.S. 113(1973) and its companion, Doe v. Bolton, 410 U.S. 179(1973), dealt with state statutes forbidding the performance of abortions as such. The statutes of some states, such as New Jersey, were left open to a saving construction to meet the tests of Roe v. Wade. See, e.g., USA ex rel Norflett v. Hilton, Civ. No. 75-1121 (D-N.J. 6/29/75) (not reported).

In any event, Roe and Doe did not touch the question whether a State legislature which enacts a health services law (whether under Title XIX or not) may choose not to include elective abortions among the eligible kinds of services. Even the cases which dealt with Medicaid statutes seem not to have considered the question whether the exclusion of payment for these services made the State itself ineligible for any federal share for failure to match the minimum standards of

Title XIX. Such ineligibility is obviously one possible result, but the question probably was not reached in those cases, as it was not reached in Doe v. Beal, because there was no federal party brought in to raise the issue. Other adversely affected persons, under such an analysis, would also need to be made parties.

Also, none of the cases relied on deal with one obvious question raised by the challenge to the Hyde Amendment, namely, the impact of the provision, in U.S. Const., Art. I, §9, cl. 7 that:

> "No money shall be drawn from the Treasury, but in consequence of appropriations made by law."

Neither the complaint, the moving papers nor the initial brief discusses this question. Yet, it cannot be avoided because, on the record before the court, the Congress simply has not appropriated any moneys for fiscal 1977 to reimburse Medicaid States with a Federal share for elective abortions.

For this question, a declaratory judgment that the Hyde Amendment is unconstitutional, or enjoining Secretary Mathews of HEW from enforcing it, or both (as asked by the complaint) would be a futile and meaningless judgment. This is because of the fact that if Secretary Mathews were to ignore the Hyde Amendment pursuant to such a judgment, the Secretary of the



Treasury would remain bound to observe the Hyde Amendment and to refuse to draw any moneys out of the Treasury for payment of a federal share to a Medicaid State on account of elective abortions. The Secretary of the Treasury is not a party to this suit and would not be bound by the court's judgment here.

Even if the Secretary of the Treasury were joined as an indispensible party for the remedy sought, a serious question arises whether any court can direct him to draw moneys from the Treasury when there is no appropriation made by law.

This clause was long ago held to be a restriction on the executive officer of the Department of the Treasury. It does not prevent the Congress from creating a liability on the part of the United States, as by Title XIX of the Social Security Law, although that liability may not be satisfied until there is an appropriation for the purpose. See, Knote v. U.S., 95 U.S. 149 (1877). Similarly, it has been held that the clause does not prevent the Congress from indicating some class of persons who are not to be paid out of a general appropriation but who need to come to the Congress for relief. See Hart's Case, 16 Ct. Cl. 459, (aff'd., Hart v. U.S., 118 U.S. 62(1886).

Under these precedents, it may be that there is no constitutional question at all, since it may have been the intention of the Congress not to make a general appropriation to reimburse Medicaid States with a federal share toward the cost of elective abortions, and instead may have wished to withdraw that determination from HEW and reserve it to itself on the application of a Medicaid State to be so reimbursed by an appropriation law other than a general one.

Thus, the limitation of the Hyde Amendment on the general appropriation law for HEW for fiscal 1977 in no way exhausts the power of the Congress to pass a law appropriating moneys out of the Treasury to reimburse New Jersey. Whether such a claim by New Jersey should be recognized and paid or not seems to be a question for Congress alone to determine. If it should so direct payment, neither the Secretary of the Treasury nor any court has any voice to say whether or not it shall be paid. U.S. v. Price, 116 U.S. 43(1885); U.S. v. Realty Co. , 163 U.S. 427(1896); Allen v. Smith, 173 U.S. 389 (1899).

Similarly, it has long been the law, as it must be in light of the clear and explicit language of the constitution,



that no officer may pay an obligation of the United States without an appropriation for that purpose and no mandamus may issue to that end. Reeside v. Walker, 52 U.S. 272 (1851); Collins v. U.S., 15 Ct. Cl. 22 (1879); Contracts of Extension of Capitol, 6 Op. Atty. Gen. 28 (1853).

At the oral argument, the court raised the question whether, if the claim were sound, the remedy sought was appropriate in light of this constitutional restriction on the Treasury.

The court called attention then to the highly analogous situation in Robinson v. Cahill, 70 N.J. 155(1976). There, the Supreme Court of New Jersey was faced with the problem of finding a constitutional vehicle for providing a remedy to carry out its underlying ruling that existing State arrangements for finding the free public schools did not comply with State constitutional requirements. Recognizing that it could not appropriate money(N.J. Const. 1947, Art. 8, §2, par. 2 contains a provision essentially the same as that involved here), it entered an order directing that no state, county or local official was to expend any moneys for the

free public schools until the legislature had appropriate funds conforming to the standards laid down by the underlying ruling.

This order did not impair existing contractual obligations, nor did it preclude making new obligations. It could not, without running afoul of several other constitutional constraints. In practical effect, the order "closed the schools", though in law it did not. School employees and others under contract were free to report for duty or render their services, and thus earn their right to compensation. They could not be paid, while the order was in effect but they could recover judgments to establish their right to payment.



If a court has the power to hold a provision of an appropriation law unconstitutional, and if the Hyde Amendment is subject to such a ruling, it may be that the only remedy a court can provide is to enter an order like that in Robinson v. Cahill. The point is a novel one on the federal scene, and the remedy is one not to be granted lightly or "routinely". If it is to be granted at all, then before making any decision on the point there should be parties before the court to represent and speak for those who would be adversely affected and disadvantaged by a judgment that no federal funds are to be drawn from the Treasury to reimburse Medicaid States for any costs incurred under their Medicaid laws until funds are appropriated for elective abortions.

The Robinson v. Cahill order initiated a constitutional confrontation whose reverberations will echo for decades to come. Such confrontations erode the foundations of the constitutional structure in ways and to an extent that no one can forecast. The judicial branch, in particular, being that branch which decides issues of constitutional law in the last resort, is exposed to the greatest risk of all the branches if it goes too far; if it goes beyond that indefinable line where its judgment has no force and cannot be carried out.

And, if it attempts to design a remedy like that in Robinson v. Cahill, it may find that it has destroyed the pattern of accommodation between the branches of government upon which the working of government depends. The doctrine of separation of powers in no way prevents all three branches from pulling together toward the same common goal. But when the three branches pull apart in separate and different directions, the structure of government itself is at risk.

The constitutional question raised by plaintiffs involves a conflict, for this reason, with another constitutional provision which is itself clear and explicit, and for that reason, a temporary restraining order is denied.

THE CONSTITUTIONAL ISSUE

The fundamental basis for this suit is an "equal protection" claim, based on the Fourteenth Amendment, and that this applies to the United States through the due process clause of the Fifth Amendment. It amounts to saying that if health services for pregnancy are to be paid for at all, no legislative body may allow payment for some and not for others. The claim is essentially one of invidious discrimination.



The presentation made so far does not address the question whether the alleged discrimination is "per se", calling on the defendant to demonstrate a compelling governmental interest in the tenor of the challenged law, or whether it falls into the "all other" category, for which any rational basis that might be thought of for the distinction made will suffice to support it.

At this stage, the court has no facts. It has a pleading from one side, some affidavits and a brief. None of them addresses this question, which goes mainly, of course, to the burden of persuasion.

Recognizing this handicap, the court observes that the major theme of the record so far is that the Hyde Amendment confronts first-trimester pregnant females otherwise eligible for Medicaid with no choice at all. The brief claims that for 85% of the cases of first-trimester abortions, the cost averages $150. nationwide, and for the second trimester, averages $350. nationwide. For those otherwise eligible for Medicaid who do not have these funds, if the Hyde Amendment has the effect claimed, such pregnant females will carry to term and some number will deliver a live child which they did not want to bear.

Since the reproductive process in the human female involves a period of gestation which no man-made law has so far been able to change, it is obvious that at least two classes of pregnant females is involved: one, consisting of those who became pregnant before the Hyde Amendment was enacted, and two, those who become pregnant thereafter.

Since the human period of gestation is roughly 9 months, an argument can be made for those eligible who became pregnant back to December 31, 1975 at the outside. Those who were not pregnant on October 1, 1976 may be a separate class, as they are on notice of the possible effect of the Hyde Amendment.

Some of the contentions advanced are based on the proposition that the Hyde Amendment reflects a denial or restriction of choice, at least for those not now pregnant but who may become pregnant, between being coerced into carrying a fetus to term or undergoing an irreversible sterilization.

Subject to proofs at trial, the choice does not appear likely to be that stark or extreme. Unlike such ailments as the common cold, measles, mumps or swine flu, pregnancy is, of



itself, neither an ailment nor a disease, but rather is a possible consequence of a male-female sexual encounter. Putting aside continence as a means for avoiding pregnancy, at least in a realistic sense since Adam and Eve left the Garden of Eden, the human female today has a number of choices of ways to avoid pregnancy, while engaging in sexual encounters, and thereby eliminating any need for abortion, which only arises if pregnancy ensues.

Certainly, five means for avoiding pregnancy are known widely enough to be the subject of judicial notice. These involve the use of (1) a male prophylactic, (2) a diaphragm, (3) an intra-uterine device, (4) contraceptive medications (the "pill"), and (5) the "rhythm" method. The first of these may be used in combination with any of the other four so as to reduce the risk of pregnancy to its potential minimum.

Nowhere in the present record is it suggested that the Hyde Amendment forecloses any of these choices. In fact, as drawn, the papers imply some kind of constitutional right to become pregnant and then to be aborted. The question is hardly that simple.

Nothing dealing with the complex aspects discussed here, and nothing

dealing with the right of the Congress not to appropriate funds for some purpose or another has ever been the subject of a ruling by an upper court. For this reason, the temporary restraining order is denied.

THE CLASS ACTION ASPECT

Jane Doe seeks to represent a class. As noted at the hearing of October 1, 1976, Doe will be allowed to prosecute the suit anonymously, Doe v. Deschamps, 64 F.R.D. 652 (D-Mont., 1974), but subject to full disclosure of facts, under seal, to permit testing of such questions as eligibility, standing, representation, definition of the class, and so on.

The physician plaintiffs also seek to represent a class, but as set out in the complaint, the definition of the class is not sufficiently clear.

The court is also aware from the oral argument that similar suits have been filed in the Eastern District of New York, and in the District of Columbia. Others may well be filed elsewhere.

At this early stage, it seems prudent not to attempt to define or certify either of the proposed classes or any sub-classes. A class may be



certified in another action, on a basis broad enough to encompass the named plaintiffs and the classes they seek to represent here. If so, an overlapping of classes in two or more courts can only lead to confusion and a duplication of the judicial time and effort available. Accordingly, no class action certification will be made until that aspect is ripe for decision.

SECURITY UNDER RULE 65 (C)

F.R.Civ.P. 65(c) requires the giving of security, in such sum as the court deems proper, as a condition to the issuance of a temporary restraining order. The security is to be provided by the applicant, and is to cover payment of such costs and damages as may be incurred or suffered by any party found to have been wrongfully restrained.

In this case, the basis or formula for security would consist of whatever sums are barred from withdrawal from the Treasury by the Hyde Amendment which plaintiffs seek to have paid under the restraining order, and interest thereon. Costs of suit would be negligible on a relative basis.

In terms, the rule is mandatory. If there be judicial discretion not to require security, such discretion cannot be exercised here. The

issue involves not only the constitutional claims advanced by plaintiffs, but an explicit and contrary constitutional restriction on the drawing of money from the Treasury without appropriation made by law. If, through means not now foreseeable, it is possible to compel the money to be drawn from the Treasury, then, if in the end it proves that plaintiffs are wrong, they will have to pay the money back.

No tender of security is made in the complaint or moving papers. The suggestion at oral argument that security is required was met by a claim of inability to provide it. That claim might be true of the plaintiff Doe, but explicit and certified financial data would need to be provided for PPHC and the physician plaintiffs (particularly if the requested class is certified) before that claim could be considered as to them.

The physicians are not claimed to render their services on a non-profit basis, particularly if the class is certified, and so should be expected to post security for repayment if it turns out that they are wrong.

For this reason, the application for a temporary restraining order is denied.



CONCLUSION

Each of the reasons given in this opinion is an independent reason for denying a temporary restraining order. The denial is without prejudice to the application for preliminary on return of the order to show cause. In addition, plaintiffs may find it prudent to amend the complaint and bring in additional parties, as noted above. Leave to file an amended complaint on or before December 6, 1976 is granted. The time within which to answer or otherwise move in respect to the complaint is extended accordingly.

The order to show cause for preliminary injunction is granted, but without provision for a temporary restraining order.

October 1, 1976

s/Vincent P. Biunno,
U.S.D.J.

Original to Clerk
xc: All counsel

ORDER OF UNITED STATES SUPREME COURT DENYING APPLICATION FOR STAY PENDING APPEAL A-346

"The application for stay of the order of the United States District Court for the Eastern District of New York in case Nos. 76-C-1804 and 76-C-1805 entered October 22, 1976, presented to Mr. Justice Marshall and by him referred to the Court, is denied.

MICHAEL RODAK, JR.
CLERK



# An Act

Making appropriations for the Departments of Labor, and Health, Education, and Welfare, and related agencies, for the fiscal year ending September 30, 1977, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Departments of Labor and Health, Education, and Welfare, and related agencies, for the fiscal year ending September 30, 1977, and for other purposes, namely:

Departments of Labor and Health, Education, and Welfare Appropriation Act, 1977.

## TITLE I—DEPARTMENT OF LABOR

### Employment and Training Administration

Department of Labor Appropriation Act, 1977.

#### PROGRAM ADMINISTRATION

For expenses of administering employment and training programs, $69,774,000, together with not to exceed $30,887,000 which may be expended from the Employment Security Administration account in the Unemployment Trust Fund, and of which $5,598,000 shall be for carrying into effect the provisions of 38 U.S.C. 2001-2003.

#### EMPLOYMENT AND TRAINING ASSISTANCE

For expenses necessary to carry into effect the Comprehensive Employment and Training Act of 1973, as amended, and sections 326 and 328 of the Trade Expansion Act of 1962 (19 U.S.C. 1951 and 1961) and sections 236, 237, and 238 of the Trade Act of 1974, (19 U.S.C. 2101) $3,311,830,000, plus reimbursements, to remain available until September 30, 1978: *Provided*, That this appropriation shall be available for the purchase and hire of passenger motor vehicles, and for construction, alteration, and repair of buildings and other facilities and for the purchase of real property for training centers as authorized by the Comprehensive Employment and Training Act of 1973, as amended, (29 U.S.C. 801 et seq.).

29 USC 801 note.
19 USC 2296, 2297, 2298.

#### COMMUNITY SERVICE EMPLOYMENT FOR OLDER AMERICANS

To carry out title IX of the Older Americans Act, as amended, $90,600,000, of which $75,300,000 shall be for section 906(a)(1).

42 USC 3056.
42 USC 3056d.

#### FEDERAL UNEMPLOYMENT BENEFITS AND ALLOWANCES

For payments during the current fiscal year of benefits and allowances to unemployed Federal employees and ex-servicemen, as authorized by title 5, chapter 85 of the United States Code, of trade adjustment benefit payments and allowances, as provided by law (19 U.S.C. 1941-1944 and 1952; part I, subchapter B, chapter 2, title II of the Trade Act of 1974), and of unemployment assistance as authorized by title II of the Emergency Jobs and Unemployment Assistance

5 USC 8501 et seq.
19 USC 2291.



77-998 O - 78

26 USC 3304 note.

Act of 1974, as amended, $860,000,000, together with such amounts as may be necessary to be charged to the subsequent appropriation for payments for any period subsequent to September 15 of the current year: *Provided*, That, in addition, there shall be transferred from the Postal Service Fund to this appropriation such sums as the Secretary of Labor determines to be the cost of benefits for ex-Postal Service employees: *Provided further*, That amounts received during the current fiscal year from the Postal Service or recovered from the States pursuant to 5 U.S.C. 8505(d) shall be available for such payments during the year.

GRANTS TO STATES FOR UNEMPLOYMENT INSURANCE AND EMPLOYMENT SERVICES

For grants for activities authorized by the Act of June 6, 1933, as amended (29 U.S.C. 49–49n; 39 U.S.C. 3202(a)(1)(E)); Veterans' Employment and Readjustment Act of 1972, as amended (38 U.S.C. 2001–2013); title III of the Social Security Act, as amended (42 U.S.C. 501–503); sections 312(e) and (g) of the Comprehensive
29 USC 882. Employment and Training Act of 1973, as amended; and necessary administrative expenses for carrying out 5 U.S.C. 8501–8523, 19 U.S.C.
19 USC 2271 et seq. 1941–1944, 1952, and chapter 2, title II, of the Trade Act of 1974, including upon the request of any State, the payment of rental for space made available to such State in lieu of grants for such purpose, $89,100,000, together with not to exceed $1,412,700,000, which may be expended from the Employment Security Administration account in the Unemployment Trust Fund and of which $239,800,000 shall be available only to the extent necessary to meet increased costs of administration resulting from changes in a State law or increases in the number of unemployment insurance claims filed and claims paid or increased salary costs resulting from changes in State salary compensation plans embracing employees of the State generally over those upon which the State's basic grant was based, which cannot be provided for by normal budgetary adjustments: *Provided*, That any portion of the funds granted to a State in the current fiscal year and not obligated by the State in that year shall be returned to the Treasury and credited to the account from which derived.

ADVANCES TO THE UNEMPLOYMENT TRUST FUND AND OTHER FUNDS

For repayable advances to the Unemployment Trust Fund, as authorized by sections 905(d) and 1203 of the Social Security Act,
42 USC 1105, 1323. as amended, and for nonrepayable advances to the "Federal unemployment benefits and allowances" account, to remain available until September 30, 1978, $5,000,000,000.

LABOR-MANAGEMENT SERVICES ADMINISTRATION

SALARIES AND EXPENSES

For necessary expenses for the Labor-Management Services Administration, $48,319,000.





PENSION BENEFIT GUARANTY CORPORATION

The Pension Benefit Guaranty Corporation is authorized to make such expenditures within limits of funds and borrowing authority available to such corporation, and in accord with law, and to make such contracts and commitments without regard to fiscal year limitations as provided by section 104 of the Government Corporation Control Act, as amended (31 U.S.C. 849), as may be necessary in carrying out the program through September 30, 1977 for such corporation.

EMPLOYMENT STANDARDS ADMINISTRATION

SALARIES AND EXPENSES

For necessary expenses for the Employment Standards Administration, including reimbursement to State, Federal, and local agencies and their employees for inspection services rendered, $92,952,000, together with $250,000 which may be expended from the Special Fund in accordance with Sections 39(c) and 44(j) of the Longshoremen's and Harbor Workers' Compensation Act. 33 USC 939, 944.

SPECIAL BENEFITS

For the payment of compensation, benefits, and expenses (except administrative expenses) accruing during the current or any prior fiscal year authorized by title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, and title V, chapter 81 of the 30 USC 901. United States Code; continuation of benefits as provided for under 5 USC 8101 the head "Civilian War Benefits" in the Federal Security Agency et seq. Appropriation Act, 1947; the Employees' Compensation Commission 60 Stat. 696. Appropriation Act, 1944; and sections 4(c) and 5(f) of the War 57 Stat. 513. Claims Act of 1948 (50 U.S.C. App. 2012); and fifty per centum of the additional compensation and benefits required by section 10(h) of the Longshoremen's and Harbor Workers' Compensation Act, as amended, $317,818,000, together with such amount as may be necessary 33 USC 910. to be charged to the subsequent year appropriation for the payment of compensation and other benefits for any period subsequent to September 15 of the current year: *Provided*, That in addition there shall be transferred from the Postal Service fund to this appropriation such sums as the Secretary of Labor determines to be the cost of administration for Postal Service employees through September 30, 1977.

Whenever the Secretary of Labor finds it will promote the achievement of the above activities, qualified persons may be appointed to conduct hearings thereunder without meeting the requirements for hearing examiners appointed under 5 U.S.C. 3105: *Provided*, That no person shall hold a hearing in any case with which he has been concerned previously in the administration of such activities.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

SALARIES AND EXPENSES

For necessary expenses for the Occupational Safety and Health Administration, $130,333,000, of which not to exceed $9,000,000 shall be available for reimbursement to States under section 7(c)(1) of

the Occupational Safety and Health Act of 1970 (29 U.S.C. 656(c)(1)) for the furnishing of consultation services to employers under section 21(c) of such Act (29 U.S.C. 670(c)): *Provided*, That none of the funds appropriated under this paragraph shall be obligated or expended for the assessment of civil penalties issued for first instance violations of any standard, rule, or regulation promulgated under the Occupational Safety and Health Act of 1970 (other than serious, willful, or repeated violations under section 17 of the Act) resulting from the inspection of any establishment or workplace subject to the Act, unless such establishment or workplace is cited, on the basis of such inspection, for 10 or more violations: *Provided further*, That none of the funds appropriated under this paragraph shall be obligated or expended to prescribe, issue, administer, or enforce any standard, rule, regulation, or order under the Occupational Safety and Health Act of 1970 which is applicable to any person who is engaged in a farming operation and employs 10 or fewer employees.

29 USC 651 note.
29 USC 666.

BUREAU OF LABOR STATISTICS

SALARIES AND EXPENSES

For necessary expenses for the Bureau of Labor Statistics, including advances or reimbursements to State, Federal, and local agencies and their employees for services rendered, $73,018,000, of which $5,614,000 shall be for expenses of revising the Consumer Price Index, including salaries of temporary personnel assigned to this project without regard to competitive civil service requirements.

DEPARTMENTAL MANAGEMENT

SALARIES AND EXPENSES

For necessary expenses for departmental management and $1,393,000 for the President's Committee on Employment of the Handicapped, $49,182,000, together with not to exceed $1,305,000, to be derived from the Employment Security Administration account, Unemployment Trust Fund.

SPECIAL FOREIGN CURRENCY PROGRAM

For payments in foreign currencies which the Treasury Department determines to be excess to the normal requirements of the United States, for necessary expenses of the Department of Labor, as authorized by law, $70,000, to remain available until expended: *Provided*, That this appropriation shall be available, in addition to other appropriations to such agency for payments in the foregoing currencies.

GENERAL PROVISIONS

SEC. 101. Appropriations in this Act available for salaries and expenses shall be available for supplies, services, and rental of conference space within the District of Columbia, as the Secretary of Labor shall deem necessary for settlement of labor-management disputes.

Citation of title.

This title may be cited as the "Department of Labor Appropriation Act, 1977".





# TITLE II—DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

HEALTH SERVICES ADMINISTRATION

HEALTH SERVICES

For carrying out, except as otherwise provided, titles III, V, X, XI, and sections 1303, 1304(a) and 1304(b) of the Public Health Service Act, the Act of August 8, 1946 (5 U.S.C. 7901), section 1 of the Act of July 19, 1963 (42 U.S.C. 253a), section 108 of Public Law 93-353, and titles V and XI of the Social Security Act, $1,016,021,000, of which $1,200,000 shall be available only for payments to the State of Hawaii for care and treatment of persons afflicted with leprosy: *Provided*, That any amounts received by the Secretary in connection with loans and loan guarantees under title XIII and any other property or assets derived by him from his operations respecting such loans and loan guarantees, including any money derived from the sale of assets, shall be available to the Secretary without fiscal year limitation for direct loans and loan guarantees, as authorized by said title XIII, in addition to funds specifically appropriated for that purpose: *Provided further*, That this appropriation shall be available for payment of the costs of medical care, related expenses, and burial expenses, hereafter incurred, by or on behalf of any person who has participated in the study of untreated syphilis initiated in Tuskegee, Alabama, in 1932, in such amounts and subject to such terms and conditions as prescribed by the Secretary of Health, Education, and Welfare, and for payment, in such amounts and subject to such terms and conditions, of such costs and expenses hereafter incurred by or on behalf of such person's wife or offspring determined by the Secretary to have suffered injury or disease from syphilis contracted from such person: *Provided further*, That when the Health Services Administration operates an employee health program for any Federal department or agency, payment for the estimated cost shall be made by way of reimbursement or in advance to this appropriation: *Provided further*, That in addition, $40,121,000 may be transferred to this appropriation as authorized by section 201(g)(1) of the Social Security Act, from any one or all of the trust funds referred to therein.

42 USC 241, 219, 300, 300b, 300e-2, 300e-3.
42 USC 253b and note.
42 USC 701, 1301.
42 USC 300e.
42 USC 401.

CENTER FOR DISEASE CONTROL

PREVENTIVE HEALTH SERVICES

To carry out, to the extent not otherwise provided, title III of the Public Health Service Act, title XVII of the Public Health Service Act, the Lead-Based Paint Poisoning Prevention Act, the Federal Coal Mine Health and Safety Act of 1969, and the Occupational Safety and Health Act of 1970; including insurance of official motor vehicles in foreign countries; and purchase, hire, maintenance, and operation of aircraft, $175,228,000: *Provided*, That training of employees of private agencies shall be made subject to reimbursement or advances to this appropriation for the full cost of such training.

42 USC 241.
Ante, p. 695.
42 USC 300u.
42 USC 4801 note.
30 USC 801 note.
29 USC 651 note.

NATIONAL INSTITUTES OF HEALTH

NATIONAL CANCER INSTITUTE

For carrying out, to the extent not otherwise provided, title IV of the Public Health Service Act with respect to cancer, $815,000,000.

42 USC 281.

NATIONAL HEART, LUNG, AND BLOOD INSTITUTE

For expenses, not otherwise provided for, necessary to carry out titles IV and XI of the Public Health Service Act with respect to heart, lung, blood vessel, and blood diseases, $596,661,000.

42 USC 281, 300b.

NATIONAL INSTITUTE OF DENTAL RESEARCH

For expenses, not otherwise provided for, to carry out title IV of the Public Health Service Act with respect to dental diseases, $55,573,000.

NATIONAL INSTITUTE OF ARTHRITIS, METABOLISM, AND DIGESTIVE DISEASES

For expenses necessary to carry out title IV of the Public Health Service Act with respect to arthritis, rheumatism, metabolic diseases, and digestive diseases, $209,000,000.

NATIONAL INSTITUTE OF NEUROLOGICAL AND COMMUNICATIVE DISORDERS AND STROKE

For expenses necessary to carry out, to the extent not otherwise provided, title IV of the Public Health Service Act with respect to neurological and communicative disorders and stroke, $155,500,000.

NATIONAL INSTITUTE OF ALLERGY AND INFECTIOUS DISEASES

For expenses, not otherwise provided for, to carry out title IV of the Public Health Service Act with respect to allergy and infectious diseases, $141,000,000.

NATIONAL INSTITUTE OF GENERAL MEDICAL SCIENCES

For expenses, not otherwise provided for, necessary to carry out title IV of the Public Health Service Act with respect to general medical sciences, $205,000,000.

NATIONAL INSTITUTE OF CHILD HEALTH AND HUMAN DEVELOPMENT

To carry out, except as otherwise provided, titles IV and X of the Public Health Service Act with respect to child health and human development, $145,543,000.

42 USC 300.

NATIONAL INSTITUTE ON AGING

To carry out, except as otherwise provided, title IV of the Public Health Service Act with respect to aging, $30,000,000.

NATIONAL EYE INSTITUTE

For expenses necessary to carry out title IV of the Public Health Service Act, with respect to eye diseases and visual disorders, $64,000,000.

NATIONAL INSTITUTE OF ENVIRONMENTAL HEALTH SCIENCES

To carry out, except as otherwise provided, sections 301, 311, and 472 of the Public Health Service Act with respect to environmental health sciences, $49,141,000.

42 USC 241, 243, 289l-1.





RESEARCH RESOURCES

To carry out, except as otherwise provided, sections 301 and 472 of the Public Health Service Act with respect to research resources and general research support grants, $137,500,000: *Provided*, That none of these funds shall be used to pay recipients of the general research support grants programs any amount for indirect expenses in connection with such grants.

42 USC 241, 289l-1.

JOHN E. FOGARTY INTERNATIONAL CENTER FOR ADVANCED STUDY IN THE HEALTH SCIENCES

For the John E. Fogarty International Center for Advanced Study in the Health Sciences, $7,992,000, of which not to exceed $1,400,000 shall be available for payment to the Gorgas Memorial Institute for maintenance and operation of the Gorgas Memorial Laboratory.

NATIONAL LIBRARY OF MEDICINE

To carry out, to the extent not otherwise provided for, section 301 with respect to health information communications and parts I and J of title III of the Public Health Service Act, $35,234,000.

42 USC 289l, 280b.

BUILDINGS AND FACILITIES

For construction of, and acquisition of sites and equipment for, facilities of or used by the National Institutes of Health, where not otherwise provided, $67,400,000 to remain available until expended.

OFFICE OF THE DIRECTOR

For expenses necessary for the Office of the Director, National Institutes of Health, $16,234,000.

Funds advanced to the National Institutes of Health management fund from appropriations in this Act shall be available for the expenses of sharing medical care facilities and resources pursuant to section 328 of the Public Health Service Act and for the purchase of not to exceed thirteen passenger motor vehicles for replacement only.

42 USC 254a.

ALCOHOL, DRUG ABUSE, AND MENTAL HEALTH ADMINISTRATION

ALCOHOL, DRUG ABUSE, AND MENTAL HEALTH

For carrying out the Public Health Service Act with respect to mental health, and except as otherwise provided, parts A, B, and D of the Community Mental Health Centers Act (42 U.S.C. 2681, et seq.), the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970, as amended, the Narcotic Addict Rehabilitation Act of 1966, and the Drug Abuse Office and Treatment Act of 1972, $763,141,000.

42 USC 4551 note. 42 USC 3401 note. 21 USC 1101 note.

SAINT ELIZABETHS HOSPITAL

For expenses necessary for the maintenance and operation of the hospital, including clothing for patients, and cooperation with organizations or individuals in the scientific research into the nature, causes, prevention, and treatment of mental illness, $60,464,000, or such amounts as may be necessary to provide a total appropriation equal

to the difference between the amount of the reimbursements received during the current fiscal year on account of patient care provided by the hospital during such year and $84,244,000.

HEALTH RESOURCES ADMINISTRATION

HEALTH RESOURCES

For carrying out, to the extent not otherwise provided, titles III, VIII, and XV and section 472 of the Public Health Service Act, section 1122 of the Social Security Act and section 222 of the Social Security Amendments of 1972, $359,008,000 of which $9,000,000 shall remain available until expended for carrying out section 305(b)(3) of the Public Health Service Act, without regard to the requirements of section 308 of said Act.

42 USC 241, 296, 300k-4, 2891-1.
42 USC 1320a-1.
42 USC 1395f note.
42 USC 242c.
42 USC 242f.

MEDICAL FACILITIES GUARANTEE AND LOAN FUND

For carrying out title XVI of the Public Health Service Act, $31,000,000 shall be available without fiscal year limitation for the payment of interest subsidies. The total principal amount of loans to be guaranteed or directly made, which may be allotted among the States, pursuant to titles VI and XVI of the Public Health Service Act shall not exceed a cumulative amount of $1,750,000,000.

42 USC 300o.
42 USC 291.

PAYMENT OF SALES INSUFFICIENCIES AND INTEREST LOSSES

For the payment of such insufficiencies as may be required by the trustee on account of outstanding beneficial interest or participations in the Health Professions Education Fund assets or Nurse Training Fund assets, authorized by the Department of Health, Education, and Welfare Appropriation Act, 1968, to be issued pursuant to section 302(c) of the Federal National Mortgage Association Charter Act, $164,000, and for payment of amounts pursuant to section 744(b) or 827(b) of the Public Health Service Act to schools which borrow any sums from the Health Professions Education Fund or Nurse Training Fund, $3,836,000: *Provided*, That the amounts appropriated herein shall remain available until expended.

81 Stat. 390.
12 USC 1717.
42 USC 294d, 297f.

HEALTH EDUCATION LOANS

The Secretary is hereby authorized to make such expenditures, within the limits of funds available in the Health Professions Education Fund and the Nurse Training Fund, and in accord with law, and to make such contracts and commitments without regard to fiscal year limitation as provided by section 104 of the Government Corporation Control Act, as amended, as may be necessary in carrying out the programs set forth in the budget for the current fiscal year.

31 USC 849.

ASSISTANT SECRETARY FOR HEALTH

SALARIES AND EXPENSES

For expenses necessary for the Office of the Assistant Secretary for Health, $22,316,000.





RETIREMENT PAY AND MEDICAL BENEFITS FOR COMMISSIONED OFFICERS

For retired pay of commissioned officers, as authorized by law, and for payments under the Retired Serviceman's Family Protection Plan; Survivor Benefit Plan and payments for medical care of dependents and retired personnel under the Dependents' Medical Care Act (10 U.S.C., ch. 55), such amount as may be required during the current fiscal year.

10 USC 1071 et seq.

SCIENTIFIC ACTIVITIES OVERSEAS (SPECIAL FOREIGN CURRENCY PROGRAM)

For payments in foreign currencies which the Treasury Department determines to be excess to the normal requirements of the United States, for necessary expenses for conducting scientific activities overseas, as authorized by law, $1,500,000, to remain available until expended: *Provided*, That this appropriation shall be available in addition to other appropriations for such activities, for payments in the foregoing currencies.

## EDUCATION DIVISION

OFFICE OF EDUCATION

ELEMENTARY AND SECONDARY EDUCATION

For carrying out, to the extent not otherwise provided, title I, part A ($2,258,981,000), title I, part B ($24,769,000), title IV, part C ($184,522,000), title VII ($115,000,000), and title IX of the Elementary and Secondary Education Act; title VII of the Education Amendments of 1974; the Environmental Education Act ($3,500,000); section 417(a)(2) of the General Education Provisions Act; the Communications Act of 1934, as amended; section 842 of Public Law 93-380; the Alcohol and Drug Abuse Education Act; part B of the Headstart-Follow Through Act ($59,000,000); and Public Law 92-506 as amended, $2,703,572,000 of which $10,500,000 shall remain available until September 30, 1978, for carrying out section 842 of Public Law 93-380 and $15,000,000 for educational broadcasting facilities shall remain available until expended, including $1,000,000 for carrying out section 392A of the Communications Act of 1934, as amended: *Provided*, That of the amounts appropriated above the following amounts shall become available for obligation on July 1, 1977, and shall remain available until September 30, 1978: title I, part A ($2,258,981,000), title I, part B ($24,769,000), title IV, part C ($184,522,000) of the Elementary and Secondary Education Act and section 417(a)(2) of the General Education Provisions Act ($1,250,000): *Provided further*, That amounts appropriated in Public Law 94-94 for carrying out title I of the Elementary and Secondary Education Act in the fiscal year 1977 shall be available for carrying out section 822 of Public Law 93-380. For carrying out title IV of the Elementary and Secondary Education Act an additional $9,478,000 for fiscal year 1978: *Provided*, That none of such funds may be paid to any State for which the allocation for fiscal year 1978 exceeds the allocation for comparable purposes for fiscal year 1977.

20 USC 241c, 241d, 1831, 880b.
20 USC 1901; 20 USC 1531 note.
20 USC 1226c.
47 USC 151; 20 USC 246.
21 USC 1001 note.
42 USC 2929.
86 Stat. 907.
47 USC 392a.
89 Stat. 468.
20 USC 241a.
20 USC 241c note.
20 USC 1801.

SCHOOL ASSISTANCE IN FEDERALLY AFFECTED AREAS

For carrying out title I of the Act of September 30, 1950, as amended (20 U.S.C., ch. 13), $768,000,000 of which $52,500,000 shall be for payments under section 6, and $715,500,000 shall be for pay-

20 USC 236 et seq. 20 USC 241.



77-998 O - 76 - 2

ments under sections 2, 3, and 4 in accordance with subsection 5(c) (1) and (2) of said Act and for payments under subparagraphs (A), (B), (C), and (D) of section 305 of the Education Amendments of 1974.

20 USC 237, 238, 239, 240.

For carrying out the Act of September 23, 1950, as amended (20 U.S.C., ch. 19), $25,000,000, which shall remain available until expended, shall be for providing school facilities as authorized by said Act of September 23, 1950: *Provided*, That, with the exception of up to $6,000,000 for repairs for facilities constructed under section 10, none of the funds contained herein for providing school facilities shall be available to pay for any other section of the Act of September 23, 1950, until payment has been made of 100 per centum of the amounts payable under section 5 and subsections 14(a) and 14(b): *Provided further*, That, of the funds provided herein for carrying out the Act of September 23, 1950, no more than $8,000,000 may be used to fund section 5 of said Act: *Prorided further*, That, notwithstanding section 421A(c)(2)(A) of the General Education Provisions Act, the Commissioner of Education is authorized to approve applications for funds to increase school facilities in communities located near the Trident Support Site, Bangor, Washington, on such terms and conditions as he may reasonably require without regard to any provision in law.

20 USC 238. 20 USC 631 et seq. 20 USC 640. 20 USC 635, 644. 20 USC 1231.

EMERGENCY SCHOOL AID

For carrying out title IV of the Civil Rights Act of 1964 and the Emergency School Aid Act, $274,700,000, of which $35,750,000 shall be for section 708(a) and $137,600,000 shall be for section 706(a) of the Emergency School Aid Act.

42 USC 2000c. 20 USC 1601 note. 20 USC 1607, 1605.

EDUCATION FOR THE HANDICAPPED

For carrying out, to the extent not otherwise provided, the Education of the Handicapped Act, as amended by Public Law 94-142, except for sections 607 and 618 $467,625,000: *Provided*, That of this amount, $315,000,000 for part B and $12,500,000 for section 619 shall become available for obligation on July 1, 1977, and shall remain available until September 30, 1978: *Provided*, That the appropriations for "Education for the handicapped" contained in title I, chapter VI of Public Law 94-303 (Second Supplemental Appropriations Act, 1976) is amended by adding at the end thereof ", to remain available until September 30, 1977": *Provided further*, That funds contained in this title for "Special benefits for disabled coal miners" shall remain available for benefit payments from July 1, 1976 through September 30, 1977.

20 USC 1401 note. 20 USC 1406, 1418. 20 USC 1419. Ante, p. 611.

OCCUPATIONAL, VOCATIONAL, AND ADULT EDUCATION

For carrying out, to the extent not otherwise provided, parts B and C ($844,000,000) and section 104(b) of the Vocational Education Act of 1963, as amended (20 U.S.C. 1241-1391), and the Adult Education Act of 1966, $932,053,000, including not to exceed $31,500,000 for research and training under part C of said 1963 Act: *Provided*, That of the amounts appropriated above the following amounts shall become available for obligation on July 1, 1977, and shall remain available until September 30, 1978: part B ($475,000,000), part C ($18,000,000) and section 104(b) ($4,316,000) of the Vocational Education Act of 1963 and $80,500,000 for the Adult Education Act.

20 USC 1201 note. 20 USC 1281. 20 USC 1244.





HIGHER EDUCATION

For carrying out, to the extent not otherwise provided, title IV and section 966 of the Higher Education Act, the Emergency Insured Student Loan Act of 1969, the Mutual Educational and Cultural Exchange Act of 1961, and section 22 of the Act of June 29, 1935, as amended (7 U.S.C. 329), $352,170,000, of which $325,000,000 for subsidies on guaranteed student loans shall remain available until expended.

20 USC 1061, 1134r-1. 20 USC 1078a note. 22 USC 2451 note.

LIBRARY RESOURCES

For carrying out, to the extent not otherwise provided, titles I ($56,900,000) and III ($3,337,000) of the Library Services and Construction Act (20 U.S.C., ch. 16); and title IV, part B ($154,330,000) of the Elementary and Secondary Education Act, $214,567,000: *Provided*, That the amount appropriated above for title IV, part B of the Elementary and Secondary Education Act shall become available for obligation on July 1, 1977, and shall remain available until September 30, 1978.

20 USC 352, 355e. 20 USC 1821.

SPECIAL PROJECTS AND TRAINING

For carrying out the Special Projects Act (Public Law 93-380) and section 422(a) of the General Education Provisions Act, $47,493,000.

20 USC 1851 note. 20 USC 1231a.

EDUCATIONAL ACTIVITIES OVERSEAS (SPECIAL FOREIGN CURENCY PROGRAM)

For payments in foreign currencies which the Treasury Department determines to be in excess to the normal requirements of the United States, for necessary expenses of the Office of Education, as authorized by law, $2,000,000, to remain available until expended: *Provided*, That this appropriation shall be available, in addition to other appropriations to such office, for payments in the foregoing currencies.

SALARIES AND EXPENSES

For carrying out, to the extent not otherwise provided, the General Education Provisions Act, and the Education Amendments of 1974, including rental of conference rooms in the District of Columbia, $115,784,000.

20 USC 1221. 20 USC 821 note.

HIGHER EDUCATION FACILITIES LOAN AND INSURANCE FUND

For the payment of such insufficiencies as may be required by the trustee on account of outstanding beneficial interest or participations in assets of the Office of Education authorized by the Department of Health, Education, and Welfare Appropriation Act, 1968, to be issued pursuant to section 302(c) of the Federal National Mortgage Association Charter Act (12 U.S.C. 1717(c)), $2,119,000, to remain available until expended, and the Secretary is hereby authorized to make such expenditures, within the limits of funds available in the Higher Education Facilities Loan and Insurance Fund, and in accord with law, and to make such contracts and commitments without regard to fiscal year limitation as provided by section 104 of the Government Corporation Control Act (31 U.S.C. 849) as may be necessary in carrying out the program set forth in the budget for the current fiscal year for such fund.

81 Stat. 836.

### Office of the Assistant Secretary for Education

#### SALARIES AND EXPENSES

For necessary expenses to carry out sections 402 and 406 of the General Education Provisions Act, $20,446,000, of which not to exceed $1,500 may be for official reception and representation expenses.

20 USC 1221b, 1221e-1.

### Social and Rehabilitation Service

#### PUBLIC ASSISTANCE

For carrying out, except as otherwise provided, titles I, IV, X, XI, XIV, XVI, XIX, and XX of the Social Security Act, and the Act of July 5, 1960 (24 U.S.C., ch. 9) $18,040,850,000, of which $56,500,000 shall be for child welfare services under part B of title IV.

42 USC 301, 601, 1201, 1301, 1351, 1381, 1396, 1397.

For making, after June 30 of the current fiscal year, payments to States under titles I, IV, X, XIV, XVI, XIX and XX, respectively, of the Social Security Act, for the last three months of the current fiscal year (except with respect to activities included in the appropriation for "Work incentives"); and for making after July 31 of the current fiscal year, payments for the first quarter of the succeeding fiscal year; such sums as may be necessary, the obligations incurred and the expenditures made thereunder for payments under each of such titles to be charged to the subsequent appropriations therefor for the current or succeeding fiscal year.

24 USC 321 et seq. 42 USC 620.

In the administration of titles I, IV (other than part C thereof), X, XIV, XVI, XIX, and XX, respectively, of the Social Security Act, payments to a State under any such titles for any quarter in the period beginning July 1, 1976, and ending September 30, 1977 may be made with respect to a State plan approved under such title prior to or during such period, but no such payment shall be made with respect to any plan for any quarter prior to the quarter in which a subsequently approved plan was submitted.

Such amounts as may be necessary from this appropriation shall be available for grants to States for any period in fiscal year 1976 and the period July 1, 1976 through September 30, 1976 subsequent to March 31, 1976.

#### WORK INCENTIVES

For carrying out a work incentives program, as authorized by part C of title IV of the Social Security Act, including registration of individuals for such program, and for related child care and other supportive services, as authorized by section 402(a)(19)(G) of the Act, including transfer to the Secretary of Labor, as authorized by section 431 of the Act, $370,000,000, which shall be the maximum amount available for transfer to the Secretary of Labor and to which the States may become entitled pursuant to section 403(d) of such Act, for these purposes.

42 USC 630. 42 USC 602. 42 USC 631. 42 JSC 603.

#### PROGRAM ADMINISTRATION

For expenses necessary for the administration of public assistance programs, $62,895,000.





### Social Security Administration

#### PAYMENTS TO SOCIAL SECURITY TRUST FUNDS

For payment to the Federal Old-Age and Survivors Insurance, the Federal Disability Insurance, the Federal Hospital Insurance, and the Federal Supplementary Medical Insurance Trust Funds, as provided under sections 217(g), 228(g), 229(b), and 1844 of the Social Security Act, and sections 103(c) and 111(d) of the Social Security Amendments of 1965, $6,713,902,000.

42 USC 417, 428, 429, 1395w. 42 USC 426a, 1395i-1.

#### SPECIAL BENEFITS FOR DISABLED COAL MINERS

For carrying out title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, including the payment of travel expenses either on an actual cost or commuted basis, to an individual for travel incident to medical examinations, and to parties, their representatives and all reasonably necessary witnesses for travel within the United States, Puerto Rico, and the Virgin Islands, to reconsideration interviews and to proceedings before administrative law judges, $913,897,000: *Provided*, That after July 31, such amounts for benefit payments as may be necessary may be charged to the subsequent year appropriation.

30 USC 901.

Whenever the Commissioner of Social Security finds it will promote the achievement of the provisions of title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, qualified persons may be appointed to conduct hearings thereunder without meeting the requirements for administrative law judges appointed under 5 U.S.C. 3105, but such appointments shall terminate not later than March 31, 1978: *Provided*, That no person shall hold a hearing in any case with which he has been concerned previously in the administration of such title.

#### SUPPLEMENTAL SECURITY INCOME PROGRAM

For carrying out the Supplemental Security Income program under title XVI of the Social Security Act, section 401 of Public Law 92-603, and section 212 of Public Law 93-66, including payment to the social security trust funds for administrative expenses incurred pursuant to section 201(g)(1) of the Social Security Act, $5,895,122,000: *Provided*, That for carrying out these activities after July 31, such sums as may be necessary shall be available, the obligations and expenditures therefor to be charged to the appropriation for the succeeding fiscal year.

42 USC 1381. 42 USC 1382e note. 87 Stat. 155, 957. 42 USC 401.

#### LIMITATION ON SALARIES AND EXPENSES

For necessary expenses, not more than $2,561,773,000 may be expended as authorized by section 201(g)(1) of the Social Security Act, from any one or all of the trust funds referred to therein: *Provided*, That such amounts as are required shall be available to pay travel expenses either on an actual cost or commuted basis, to an individual for travel incident to medical examinations, and to parties, their representatives and all reasonably necessary witnesses for travel within the United States, Puerto Rico, and the Virgin Islands to reconsideration interviews and to proceedings before administrative law judges under titles II, XVI, and XVIII of the Social Security Act: *Provided further*, That $25,000,000 of the foregoing amount shall be apportioned for use pursuant to section 3679 of the Revised Statutes

42 USC 421 note. 42 USC 401, 1381, 1395.

(31 U.S.C. 665), only to the extent necessary to process workloads not anticipated in the budget estimates and to meet mandatory increases in costs of agencies or organizations with which agreements have been made to participate in the administration of titles XVI and XVIII and section 221 of title II of the Social Security Act, and after maximum absorption of such costs within the remainder of the existing limitation has been achieved: *Provided further*, That such amounts as may be required may be expended for administration within the United States of the social insurance program of the United Kingdom, under terms of an agreement wherein similar services will be provided by the United Kingdom in that country for administration of the social insurance program of the United States.

42 USC 1381, 1395, 421.

LIMITATION ON CONSTRUCTION

For acquisition of sites, construction and equipment of facilities and for payments of principal, interest, taxes, and any other obligations under contracts entered into pursuant to the Public Buildings Purchase Contract Act of 1954 and the Public Buildings Amendments of 1972, $1' 100,000, to be expended as authorized by section 201(g)(1) of the Social Security Act, from any one or all of the trust funds referred to therein, and to remain available until expended.

40 USC 356 note. 40 USC 603 note. 42 USC 401.

SPECIAL INSTITUTIONS

AMERICAN PRINTING HOUSE FOR THE BLIND

For carrying out the Act of March 3, 1879, as amended (20 U.S.C. 101-105), $3,012,000.

NATIONAL TECHNICAL INSTITUTE FOR THE DEAF

For carrying out the National Technical Institute for the Deaf Act (20 U.S.C. 681, et seq.), $12,675,000.

GALLAUDET COLLEGE

For carrying out the Model Secondary School for the Deaf Act (80 Stat. 1027) and for the partial support of Gallaudet College authorized by the Act of June 18, 1954 (68 Stat. 265), $40,840,000 of which $15,575,000 shall be for construction and shall remain available until expended: *Provided*, That if requested by the college, such construction shall be supervised by the General Services Administration.

D.C. Code 31-1051 note. D.C. Code 31-1025 note.

HOWARD UNIVERSITY

For the partial support of Howard University, $82,409,000, of which $2,500,000 shall be for construction and shall remain available until expended: *Provided*, That if requested by the university, such construction shall be supervised by the General Services Administration.

ASSISTANT SECRETARY FOR HUMAN DEVELOPMENT

HUMAN DEVELOPMENT

For carrying out, except as otherwise provided, section 426 of the Social Security Act, the Act of April 9, 1912 (42 U.S.C. 191), the Older Americans Act of 1965, as amended, the Child Abuse Prever

42 USC 626. 42 USC 3001 note.





tion and Treatment Act, the Runaway Youth Act, the Community Services Act of 1974, sections 106, 107 and 306 of the Comprehensive Employment and Training Act of 1973, the Rehabilitation Act of 1973, as amended, the International Health Research Act of 1960, the Developmental Disabilities Services and Facilities Construction Act, as amended, and the White House Conference on Handicapped Individuals Act, $1,896,023,000, of which $740,000,000 shall be for activities under section 110(a) of the Rehabilitation Act of 1973; $309,000 shall be for section 110(b) of such Act; and $30,058,000 shall be for grants under part C of the Developmental Disabilities Services and Facilities Construction Act, as amended, together with not to exceed $600,000 to be transferred from the Federal Disability Insurance Trust Fund and the Federal Old-Age and Survivors Insurance Trust Fund as provided by section 201(g)(1) of the Social Security Act: *Provided further*, That the level of operations for the nutrition services for the elderly program shall be $225,000,000 per annum.

42 USC 5101 note; 42 USC 5601 note. 42 USC 2701 note. 29 USC 816, 817, 875. 29 USC 701 note; 22 USC 2101 note. 42 USC 2661 note. 29 USC 701 note. 29 USC 730. 42 USC 401.

DEPARTMENTAL MANAGEMENT

OFFICE FOR CIVIL RIGHTS

For expenses necessary for the Office for Civil Rights $29,685,000, together with not to exceed $919,000, to be transferred and expended as authorized by section 201(g)(1) of the Social Security Act from any one or all of the trust funds referred to therein.

GENERAL DEPARTMENTAL MANAGEMENT

For expenses not otherwise provided, necessary for general departmental management, including hire of six medium sedans, $89,511,000 together with not to exceed $12,872,000 to be transferred and expended as authorized by section 201(g)(1) of the Social Security Act from any one or all of the trust funds referred to therein.

POLICY RESEARCH

For carrying out, to the extent not otherwise provided, research studies under section 232 of the Community Services Act of 1974 and section 1110 of the Social Security Act, $20,000,000.

42 USC 2825. 42 USC 1310.

GENERAL PROVISIONS

SEC. 201. None of the funds appropriated by this title to the Social and Rehabilitation Service for grants-in-aid of State agencies to cover, in whole or in part, the cost of operation of said agencies, including the salaries and expenses of officers and employees of said agencies, shall be withheld from the said agencies of any States which have established by legislative enactment and have in operation a merit system and classification and compensation plan covering the selection, tenure in office, and compensation of their employees, because of any disapproval of their personnel or the manner of their selection by the agencies of the said States, or the rates of pay of said officers or employees.

Withholding of funds, restriction.

SEC. 202. Funds appropriated in this Act to the American Printing House for the Blind, Howard University, the National Technical Institute for the Deaf, and Gallaudet College shall be awarded to these institutions in the form of lump-sum grants and expenditures made therefrom shall be subject to audit by the Secretary of Health, Education, and Welfare.

Expenditures subject to audit.

SEC. 203. None of the funds provided herein shall be used to pay any recipient of a grant for the conduct of a research project an amoun. equal to as much as the entire cost of such project.

Federal positions in Washington.

SEC. 204. None of the funds contained in this title shall be available for additional permanent positions in the Washington area if the total authorized positions in the Washington area is allowed to exceed the proportion existing at the close of fiscal year 1966.

SEC. 205. Appropriations in this Act for the Health Services Administration, the National Institutes of Health, the Center for Disease Control, the Alcohol, Drug Abuse, and Mental Health Administration, the Health Resources Administration and Departmental Management shall be available for expenses for active commissioned officers in the Public Health Service Reserve Corps and for not to exceed two thousand eight hundred commissioned officers in the Regular Corps; expenses incident to the dissemination of health information in foreign countries through exhibits and other appropriate means; advances of funds for compensation, travel, and subsistence expenses (or per diem in lieu thereof) for persons coming from abroad to participate in health or scientific activities of the Department pursuant to law; expenses of primary and secondary schooling of dependents in foreign countries, of Public Health Service commissioned officers stationed in foreign countries, at costs for any given area not in excess of those of the Department of Defense for the same area, when it is determined by the Secretary that the schools available in the locality are unable to provide adequately for the education of such dependents, and for the transportation of such dependents between such schools and their places of residence when the schools are not accessible to such dependents by regular means of transportation; rental or lease of living quarters (for periods not exceeding 5 years), and provision of heat, fuel, and light, and maintenance, improvement, and repair of such quarters, and advance payments therefor, for civilian officers, and employees of the Public Health Service who are United States citizens and who have a permanent station in a foreign country; purchase, erection, and maintenance of temporary or portable structures; and for the payment of compensation to consultants or individual scientists appointed for limited periods of time pursuant to section 207(f) or section 207(g) of the Public Health Service Act, at rates established by the Assistant Secretary for Health, or the Secretary where such action is required by statute, not to exceed the per diem rate equivalent to the rate for GS–18; not to exceed $9,500 for official reception and representation expenses related to any health agency of the Department when specifically approved by the Assistant Secretary for Health.

42 USC 209.

5 USC 5332 note.

Forced student busing.

SEC. 206. No part of the funds contained in this title may be used to force any school or school district which is desegregated as that term is defined in title IV of the Civil Rights Act of 1964, Public Law 88–352, to take any action to force the busing of students; to force on account of race, creed, or color the abolishment of any school so desegregated; or to force the transfer or assignment of any student attending any elementary or secondary school so desegregated to or from a particular school over the protest of his or her parents or parent.

42 USC 2000c.

SEC. 207. (a) No part of the funds contained in this title shall be used to force any school or school district which is desegregated as that term is defined in title IV of the Civil Rights Act of 1964, Public Law 88–352, to take any action to force the busing of students; to require the abolishment of any school so desegregated; or to force on account of race, creed, or color the transfer of students to or from





a particular school so desegregated as a condition precedent to obtaining Federal funds otherwise available to any State, school district, or school.

(b) No funds appropriated in this Act may be used for the transportation of students or teachers (or for the purchase of equipment for such transportation) in order to overcome racial imbalance in any school or school system, or for the transportation of students or teachers (or for the purchase of equipment for such transportation) in order to carry out a plan of racial desegregation of any school or school system.

SEC. 208. None of the funds contained in this Act shall be used to require, directly or indirectly, the transportation of any student to a school other than the school which is nearest the student's home, and which offers the courses of study pursued by such student, in order to comply with title VI of the Civil Rights Act of 1964.

42 USC 2000d.

SEC. 209. None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term.

## TITLE III—RELATED AGENCIES

### ACTION

#### OPERATING EXPENSES, DOMESTIC PROGRAMS

For expenses necessary for Action to carry out the provisions of the Domestic Volunteer Service Act of 1973, as amended, $108,200,000.

42 USC 4951 note.

### COMMUNITY SERVICES ADMINISTRATION

#### COMMUNITY SERVICES PROGRAM

For expenses of the Community Services Administration, $511,170,000.

### CORPORATION FOR PUBLIC BROADCASTING

#### PUBLIC BROADCASTING FUND

For payment to the Corporation for Public Broadcasting, as authorized by the Public Broadcasting Financing Act of 1975, an amount which shall be available within limitations specified by said Act, for the fiscal year 1977, $103,000,000; for the fiscal year 1978, $107,150,000; and for the fiscal year 1979, $120,200,000: *Provided*, That no funds made available to the Corporation for Public Broadcasting by this Act shall be used to pay for receptions, parties and similar forms of entertainment for government officials or employees: *Provided further*, That none of the funds contained in this paragraph shall be available or used to aid or support any program or activity excluding from participation in, denying the benefits of, or discriminating against any person in the United States, on the basis of race, color, national origin, religion, or sex.

47 USC 396 note.

### FEDERAL MEDIATION AND CONCILIATION SERVICE

#### SALARIES AND EXPENSES

For expenses necessary for the Federal Mediation and Conciliation Service to carry out the functions vested in it by the Labor-Management Relations Act, 1947 (29 U.S.C. 171–180, 182), including expenses of the Labor-Management Panel and boards of inquiry appointed by

the President; hire of passenger motor vehicles; and rental of conference rooms in the District of Columbia; and for expenses necessary pursuant to Public Law 93-360 for mandatory mediation in health care industry negotiation disputes, and for convening factfinding boards of inquiry appointed by the Director in the health care industry, $20,328,000.

88 Stat. 395.

NATIONAL COMMISSION ON LIBRARIES AND INFORMATION SCIENCE

SALARIES AND EXPENSES

For necessary expenses of the National Commission on Libraries and Information Science, established by the Act of July 20, 1970 (Public Law 91-345), $492,575.

20 USC 1501 note.

NATIONAL LABOR RELATIONS BOARD

SALARIES AND EXPENSES

For expenses necessary for the National Labor Relations Board to carry out the functions vested in it by the Labor-Management Relations Act, 1947, as amended (29 U.S.C. 141-167), and other laws, $77,776,000: *Provided*, That no part of this appropriation shall be available to organize or assist in organizing agricultural laborers or used in connection with investigations, hearings, directives, or orders concerning bargaining units composed of agricultural laborers as referred to in section 2(3) of the Act of July 5, 1935 (29 U.S.C. 152), and as amended by the Labor-Management Relations Act, 1947, as amended, and as defined in section 3(f) of the Act of June 25, 1938 (29 U.S.C. 203), and including in said definition employees engaged in the maintenance and operation of ditches, canals, reservoirs, and waterways when maintained or operated on a mutual, nonprofit basis and at least 95 per centum of the water stored or supplied thereby is used for farming purposes.

NATIONAL MEDIATION BOARD

SALARIES AND EXPENSES

For expenses necessary for carrying out the provisions of the Railway Labor Act, as amended (45 U.S.C. 151-188), including emergency boards appointed by the President, $3,606,000.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SALARIES AND EXPENSES

For expenses necessary for the Occupational Safety and Health Review Commission, $6,280,000.

RAILROAD RETIREMENT BOARD

PAYMENTS TO RAILROAD RETIREMENT TRUST FUND

For payment to the Railroad Retirement Account, as provided under sections 15(b) and 15(d) of the Railroad Retirement Act of 1974, $250,000,000.

45 USC 231n.





REGIONAL RAIL TRANSPORTATION PROTECTIVE ACCOUNT

For payment of benefits under section 509 of the Regional Rail Reorganization Act of 1973, to remain available until expended, including not to exceed $100,000 for payment to the Railroad Retirement Board for administrative expenses, $40,000,000.

45 USC 779.

LIMITATION ON SALARIES AND EXPENSES

For expenses necessary for the Railroad Retirement Board, $33,723,000, to be derived from the railroad retirement accounts: *Provided*, That $500,000 of the foregoing amount shall be apportioned for use pursuant to section 3679 of the Revised Statutes, as amended (31 U.S.C. 665), only to the extent necessary to process workloads not anticipated in the budget estimates and after maximum absorption of the costs of such workloads within the remainder of the foregoing limitation has been achieved: *Provided further*, That notwithstanding any other provision in law, no portion of this limitation shall be available for payments of standard level user charges pursuant to section 210(j) of the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 490(j); 45 U.S.C. 228a-r).

SOLDIERS' AND AIRMEN'S HOME

OPERATION AND MAINTENANCE

For maintenance and operation of the United States Soldiers' and Airmen's Home, to be paid from the Soldiers' and Airmen's Home permanent fund, $15,373,000: *Provided*, That this appropriation shall not be available for the payment of hospitalization of members of the Home in United States Army hospitals at rates in excess of those prescribed by the Secretary of the Army upon recommendation of the Board of Commissioners of the Home and the Surgeon General of the Army.

## TITLE IV—GENERAL PROVISIONS

Experts and consultants.

SEC. 401. Appropriations contained in this Act, available for salaries and expenses, shall be available for services as authorized by 5 U.S.C. 3109 but at rates for individuals not to exceed the per diem rate equivalent to the rate for GS-18.

5 USC 5332 note.

Uniform allowances.

SEC. 402. Appropriations contained in this Act available for salaries and expenses shall be available for uniforms or allowances therefor as authorized by law (5 U.S.C. 5901-5902).

Meetings.

SEC. 403. Appropriations contained in this Act available for salaries and expenses shall be available for expenses of attendance at meetings which are concerned with the functions or activities for which the appropriation is made or which will contribute to improved conduct, supervision, or management of those functions or activities.

Funds to campus disrupters, prohibition.

SEC. 404. No part of the funds appropriated under this Act shall be used to provide a loan, guarantee of a loan, a grant, the salary of or any remuneration whatever to any individual applying for admission, attending, employed by, teaching at, or doing research at an institution of higher education who has engaged in conduct on or after August 1, 1969, which involves the use of (or the assistance to others in the use of) force or the threat of force or the seizure of property under the control of an institution of higher education, to require or prevent the availability of certain curriculum, or to prevent the faculty, administrative officials, or students in such institution from engaging

in their duties or pursuing their studies at such institution.

Transfer of funds.

SEC. 405. The Secretary of Labor and the Secretary of Health, Education, and Welfare are authorized to transfer unexpended balances of prior appropriations to accounts corresponding to current appropriations provided in this Act: *Provided*, That such transferred balances are used for the same purpose, and for the same periods of time, for which they were originally appropriated.

Fiscal year limitation.

SEC. 406. No part of any appropriation contained in this Act shall remain available for obligation beyond the current fiscal year unless expressly so provided herein.

Funds restriction.

SEC. 407. No part of any appropriation contained in this Act shall be used, other than for normal and recognized executive-legislative relationships, for publicity or propaganda purposes, for the preparation, distribution, or use of any kit, pamphlet, booklet, publication, radio, television or film presentation designed to support or defeat legislation pending before the Congress, except in presentation to the Congress itself.

Official receptions.

SEC. 408. The Secretary of Labor and the Secretary of Health, Education, and Welfare are each authorized to make available not to exceed $7,500 from funds available for salaries and expenses under titles I and II, respectively, for official reception and representation expenses; the Director of the Federal Mediation and Conciliation Service is authorized to make available for official reception and representation expenses not to exceed $2,500 from funds available for "Salaries and expenses, Federal Mediation and Conciliation Service".

Research progr .ms.

SEC. 409. None of the funds appropriated by this Act shall be used to pay for any research program or project or any program, project, or course which is of an experimental nature, or any other activity involving human participants, which is determined by the Secretary or a court of competent jurisdiction to present a danger to the physical, mental, or emotional well-being of a participant or subject of such program, project, or course, without the written, informed consent of each participant or subject, or his parents or legal guardian, if such participant or subject is under eighteen years of age. The Secretary shall adopt appropriate regulations respecting this section.

Regulations.

Short title.

This Act may be cited as the "Departments of Labor and Health, Education, and Welfare Appropriation Act, 1977".

CARL ALBERT
*Speaker of the House of Representatives.*

LEE METCALF
*Acting President of the Senate pro Tempore.*

IN THE HOUSE OF REPRESENTATIVES, U.S.,
*September 30, 1976.*

The House of Representatives having proceeded to reconsider the bill (H.R. 14232) entitled "An Act making appropriations for the Departments of Labor, and Health, Education, and Welfare, and related agencies, for the fiscal year ending September 30, 1977, and for other purposes", returned by the President of the United States with his objections, to the House of Representatives, in which it originated, it was





*Resolved*, That the said bill pass, two-thirds of the House of Representatives agreeing to pass the same.

Attest:

EDMUND L. HENSHAW, JR.
*Clerk.*

I certify that this Act originated in the House of Representatives.

EDMUND L. HENSHAW, JR.
*Clerk.*

IN THE SENATE OF THE UNITED STATES,
*September 30, 1976.*

The Senate having proceeded to reconsider the bill (H.R. 14232) entitled "An Act making appropriations for the Departments of Labor, and Health, Education, and Welfare, and related agencies, for the fiscal year ending September 30, 1977, and for other purposes", returned by the President of the United States with his objections, to the House of Representatives, in which it originated, and passed by the House of Representatives on reconsideration of the same, it was

*Resolved*, That the said bill pass, two-thirds of the Senators present having voted in the affirmative.

Attest:

FRANCIS R. VALEO
*Secretary.*

*By Harold G. Ast*
*Legislative Clerk.*

---

LEGISLATIVE HISTORY:

HOUSE REPORTS: No. 94-1219 (Comm. on Appropriations) and Nos. 94-1384 and 94-1555 (Comm. of Conference).
SENATE REPORT No. 94-997 (Comm. on Appropriations).
CONGRESSIONAL RECORD, Vol. 122 (1976):
June 23, 24, considered and passed House.
June 28-30, considered and passed Senate, amended.
Aug. 10, House agreed to conference report; receded and concurred in certain Senate amendments; concurred in certain others with amendments.
Aug. 25, Senate agreed to conference report; agreed to certain House amendments.
Sept. 16, House receded and concurred in Senate amendment with an amendment.
Sept. 17, Senate agreed to House amendment.
WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 12, No. 40:
Sept. 29, vetoed; Presidential message.
CONGRESSIONAL RECORD, Vol. 122 (1976):
Sept. 29, House overrode veto.
Sept. 30, Senate overrode veto.

94TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } { No. 94-1555

# MAKING APPROPRIATIONS FOR THE DEPARTMENTS OF LABOR AND HEALTH, EDUCATION, AND WELFARE, AND RELATED AGENCIES FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 1977

SEPTEMBER 15, 1976.—Ordered to be printed

Mr. FLOOD, from the committee of conference, submitted the following

## CONFERENCE REPORT

[To accompany H.R. 14232]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate numbered 68 to the bill (H.R. 14232) making appropriations for the Departments of Labor and Health, Education, and Welfare, and Related Agencies for the fiscal





year ending September 30, 1977, and for other purposes, having met, after further full and free conference, have been unable to agree.

DANIEL J. FLOOD,
NEAL SMITH,
EDWARD J. PATTEN,
DAVID R. OBEY,
EDWARD R. ROYBAL,
JOSEPH D. EARLY,
GEORGE MAHON,
ROBERT H. MICHEL,
GARNER E. SHRIVER,
SILVIO O. CONTE,
ELFORD A. CEDERBERG,
*Managers on the Part of the House.*

WARREN G. MAGNUSON,
JOHN C. STENNIS,
ROBERT C. BYRD,
WILLIAM PROXMIRE,
JOSEPH M. MONTOYA,
ERNEST F. HOLLINGS,
THOMAS F. EAGLETON,
BIRCH BAYH,
LAWTON CHILES,
JOHN L. MCCLELLAN,
EDWARD W. BROOKE,
CLIFFORD P. CASE,
HIRAM L. FONG,
TED STEVENS,
DICK SCHWEIKER,
MILTON R. YOUNG,
*Managers on the Part of the Senate.*

## JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the further conference on the disagreeing votes of the two Houses on the amendment of the Senate numbered 68 to the Bill (H.R. 14232) making appropriations for the Department of Labor, and Health, Education, and Welfare, and related agencies, for the fiscal year ending September 30, 1977, and for other purposes, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

### TITLE II—DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

#### GENERAL PROVISIONS

Amendment No. 68: Reported in technical disagreement. The managers on the part of the House will offer a motion as follows:

Restore the matter stricken by said amendment amended to read as follows:

> SEC. 209. None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term.

Section 209 of the House bill contained a prohibition against the use of funds contained in this Act to pay for or to promote or encourage abortions. The Senate bill deleted this provision.

Having met in further conference, agreement has been reached on the issue of whether or not Federal funds may be used to finance abortions. Most certainly, this is a difficult, emotionally-charged issue—one which many believe should be dealt with by the appropriate legislative committees.

Nevertheless, in an effort to resolve this issue and avoid further delay in meeting the vital needs addressed by programs in this bill, a majority of the Conferees have agreed to a modification of the House bill language.

It is the intent of the Conferees to limit the financing of abortions under the Medicaid program to instances where the performance of an abortion is deemed by a physician to be of medical necessity and to prohibit payment for abortions as a method of family planning, or for emotional or social convenience. It is not our intent to preclude payment for abortions when the life of the woman is clearly endangered, as in the case of multiple sclerosis or renal disease, if the pregnancy were carried to term. Nor is it the intent of the Conferees to prohibit medical procedures necessary for the termination of an ectopic pregnancy or for the treatment of rape or incest victims; nor is it intended to prohibit the use of drugs or devices to prevent implantation of the fertilized ovum.





Furthermore, the proposed language would not interfere with or limit Federal aid to medical schools conducting research into, or teaching of, abortion procedures for therapeutic purposes.

The Congress is aware that there are three cases related to this issue to be heard by the Supreme Court this fall, and wishes to make clear that the Congress in its action upon this particular appropriations bill does not intend to prejudge any constitutional questions involved in those cases.

The managers on the part of the Senate will move to concur in the amendment of the House to the amendment of the Senate.

DANIEL J. FLOOD,
NEAL SMITH,
EDWARD J. PATTEN,
DAVID R. OBEY,
EDWARD R. ROYBAL,
JOSEPH D. EARLY,
GEORGE MAHON,
ROBERT H. MICHEL,
GARNER E. SHRIVER,
SILVIO O. CONTE,
ELFORD A. CEDERBERG,
*Managers on the Part of the House.*

WARREN G. MAGNUSON,
JOHN C. STENNIS,
ROBERT C. BYRD,
WILLIAM PROXMIRE,
JOSEPH M. MONTOYA,
ERNEST F. HOLLINGS,
THOMAS F. EAGLETON,
BIRCH BAYH,
LAWTON CHILES,
JOHN L. MCCLELLAN,
EDWARD W. BROOKE,
CLIFFORD P. CASE,
HIRAM L. FONG,
TED STEVENS,
DICK SCHWEIKER,
MILTON R. YOUNG,
*Managers on the Part of the Senate.*

○

Presidential Document:
Gerald R. Ford, 1976,
Volume 12, No. 40, p. 1415.

## VETO OF DEPARTMENTS OF LABOR AND HEALTH, EDUCATION, AND WELFARE APPROPRIATION ACT, 1977

The President's Message to the House of Representatives Returning H.R. 14232 Without His Approval. September 29, 1976

To the House of Representatives:

Just before adjourning for the final weeks of the election campaign, the Congress has sent me H.R. 14232, the Departments of Labor, and Health, Education, and Welfare appropriations for fiscal year 1977 which begins October 1. This last and second largest of the major Federal appropriation bills to be considered by this Congress is a perfect example of the triumph of election-year politics over fiscal restraint and responsibility to the hard-pressed American taxpayer.

Contained in this bill are appropriations for numerous essential domestic programs which have worthy purposes. My budget for these purposes totaled $52.5 billion, $700 million more than this year. Since 1970 expenditures for these programs have increased at a rate 75% greater than the rate of growth in



the overall Federal Budget. Therefore, my 1977 proposals included substantial reforms in the major areas covered by these appropriations designed to improve their efficiency and reduce the growth of Federal bureaucracy and red tape.

The majority in control of this Congress has ignored my reform proposals and added nearly $4 billion in additional spending onto these programs.

The partisan political purpose of this bill is patently clear. It is to present me with the choice of vetoing these inflationary increases and appearing heedless of the human needs which these Federal programs were intended to meet, or to sign the measure and demonstrate inconsistency with my previous anti-inflationary vetoes on behalf of the American taxpayer.

It is to present me with the dilemma of offending the voting groups who benefit by these government programs, or offending those primarily concerned with certain restrictions embodied in the bill.

I am sympathetic to the purposes of most of these programs. I agree with the restriction on the use of Federal funds for abortion. My objection to this legislation is based purely and simply on the issue of fiscal integrity.

I believe the American people are wiser than the Congress thinks. They know that compassion on the part of the Federal Government involves more than taking additional cash from their paychecks. They know that inflationary spending and larger deficits must be paid for not only by all Federal taxpayers but by every citizen, including the poor, the unemployed, the retired persons on fixed incomes, through the inevitable reduction in the purchasing power of their dollars.

I believe strongly in compassionate concern for those who cannot help themselves, but I have compassion for the taxpayer, too. My sense of compassion also says that we shouldn't ask the taxpayers to spend their money for a tangled mess of programs that the Congress itself has shown all too often to be wasteful and inefficient--programs which all too often fail to really help those in need.

The Congress says it cares about cutting inflation and controlling Federal spending.

The Congress says it wants to stop fraud and abuse in Federal programs.

The Congress says it wants to end duplication and overlap in Federal activities.



But when you examine this bill carefully you discover that what the Congress says has very little to do with what the Congress does.

If the Congress really cared about cutting inflation and controlling Federal spending, would it send me a bill that is $4 billion over my $52.5 billion request?

If the Congress really wanted to stop fraud and abuse in Federal programs like Medicaid, would it appropriate more money this year than it did last year without any reform?

If the Congress really wanted to end duplication and overlap in Federal activities, would it continue all of these narrow programs this year--at higher funding levels than last year?

If the Congress really wanted to cut the deficit and ease the burden on the taxpayer, would it ignore serious reform proposals?

The resounding answer to all of these questions is no.

Our longtime ally, Great Britain, has now reached a critical point in its illustrious history. The British people must now make some very painful decisions on government spending. As Prime Minister Callaghan courageously said just yesterday, "Britain for too long has

lived on borrowed time, borrowed money and borrowed ideas. We will fail if we think we can buy our way out of our present difficulties by printing confetti money and by paying ourselves more than we earn."

I cannot ask American taxpayers to accept unwarranted spending increases without a commitment to serious reform. I do not believe the people want more bureaucratic business as usual. I believe the people want the reforms I have proposed which would target the dollars on those in real need while reducing Federal interference in our daily lives and returning more decion-making freedom to State and local levels where it belongs.

I therefore return without my approval H.R. 14232, and urge the Congress to enact immediately my budget proposals and to adopt my program reforms.

GERALD R. FORD

The White House,
September 29, 1976.

---

NOTE: The President's veto was overridden by the House of Representatives and the Senate on September 30, 1976. The bill (H.R. 14232) became Public Law 94-439, without the President's signature on September 30, 1976.